

LOAN DOCUMENT

PHOTOGRAPH THIS SHEET

TSAGSA

0

DTIC ACCESSION NUMBER

LEVEL

INVENTORY

*Legal Bases for the Use of Force
Against International Terrorism: The U.S.
Paradigm of Humanitarian Self-Defense*

DOCUMENT IDENTIFICATION

April 1999

DISTRIBUTION STATEMENT A

Approved for Public Release
Distribution Unlimited

DISTRIBUTION STATEMENT

ACCESSION FOR	
NTIS	GRAM <input type="checkbox"/>
DTIC	TRAC <input type="checkbox"/>
UNANNOUNCED	<input type="checkbox"/>
JUSTIFICATION	
BY	
DISTRIBUTION/	
AVAILABILITY CODES	
DISTRIBUTION	AVAILABILITY AND/OR SPECIAL
<i>A-1</i>	

DISTRIBUTION STAMP

DATE ACCESSIONED

DATE RETURNED

REGISTERED OR CERTIFIED NUMBER

20051109 044

DATE RECEIVED IN DTIC

PHOTOGRAPH THIS SHEET AND RETURN TO DTIC-FDAC

H
A
N
D
L
E

W
I
T
H

C
A
R
E

LEGAL BASES FOR THE USE OF FORCE AGAINST INTERNATIONAL TERRORISM: THE U.S. PARADIGM OF HUMANITARIAN SELF-DEFENSE

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

BY MAJOR JEFFRY S. BRADY
UNITED STATES MARINE CORPS

47TH JUDGE ADVOCATE OFFICER GRADUATE COURSE
APRIL 1999

LEGAL BASES FOR THE USE OF FORCE AGAINST INTERNATIONAL TERRORISM: THE U.S. PARADIGM OF HUMANITARIAN SELF-DEFENSE

by Major Jeffry S. Brady
U.S. Marine Corps

ABSTRACT: This thesis examines the international legal bases to combat international terrorism. Traditional concepts of international law are unsuited to the modern terrorist threat. The application of traditional international law concepts to the 1998 U.S. missile strikes in Afghanistan and Sudan leads to a conclusion that the strikes were an illegitimate extension of customary principles. In addition, multilateral terrorism agreements have been largely ineffective to combat terrorist acts. The United Nations Security Council is ill equipped to deal with the modern terrorist threat as well. This thesis concludes that customary international law has evolved from a sovereignty approach, or peace-based application of the U.N. Charter, to a justice-based approach. This justice-based approach has as its foundation the protection of fundamental human rights, originating in the Charter and developing through the practice of nations and evolution of international law. This evolution of customary international law, toward the protection of human rights as a fundamental principle of legal construction, validates the U.S. paradigm of humanitarian self-defense first articulated after the raid on Entebbe in 1976. The legal analysis thereby shifts from immediacy and concerns of sovereignty, to justness and the lack of manipulation of motive for intervention.

**LEGAL BASES FOR THE USE OF FORCE AGAINST
INTERNATIONAL TERRORISM: THE U.S. PARADIGM OF
HUMANITARIAN SELF-DEFENSE**

MAJOR JEFFRY S. BRADY*

* Judge Advocate, United States Marine Corps. B.B.A., 1984, Iowa State University; J.D., 1992, Drake University. Presently assigned to the 47th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. Formerly assigned to Headquarters and Headquarters Squadron, Marine Corps Air Station, Beaufort, South Carolina, 1995-1998, Staff Judge Advocate 1997-1998; Chief Trial Counsel, 1996-1997, Chief Defense Counsel, 1995-1996; Legal Assistance Officer, 1994-1995, Chief Trial Counsel and Operational Law Officer, 1992-1994, Marine Corps Air Station, Cherry Point, North Carolina; Officer Selection Officer, 1988-1989, Recruiting Station, Pittsburgh, Pennsylvania; Company Executive Officer, Rifle Platoon Commander, Weapons Platoon Commander, Battalion Adjutant, 1985-1988, 2d Battalion, 3d Marines, 1st Marine Expeditionary Brigade, Kaneohe Bay, Hawaii; Marine Corps and Navy enlisted service, 1980-1985, various duty stations in the United States. The article is a thesis that was submitted in partial completion of the Master of Laws requirements of the 47th Judge Advocate Officer Graduate Course.

TABLE OF CONTENTS

I. Introduction	1
A. <i>International Support For United States Strikes</i>	3
B. <i>International Condemnation of the Strikes</i>	4
C. <i>Conclusions to be Drawn from the World Community's Response</i>	7
D. <i>A Legitimate Basis Exists under International Law to Violate the Territorial Integrity of Another Nation to Protect the Citizens of a Nation State.</i>	9
II. Conventional Legal Methods and Means Advocated for Dealing with the Problem of International Terrorism	11
A. <i>Four Legal Bases Have Been Advanced to Justify Use of Armed Force Against International Terrorism in the Sovereign Territory of Other Nations.</i>	11
1. <i>Inherent Right of Self-Defense, Article 51, U.N. Charter.</i>	13
2. <i>Peacetime Reprisal</i>	26
3. <i>Acts not directed at the territorial integrity or political independence of another State.</i>	35
4. <i>Utilization of the United Nations Process: Security Council Actions</i>	40
III. Legal Means and Methods to Combat Terrorism not Involving Force: Terrorism Treaties and Prosecution	44
A. <i>International Terrorism Agreements -- Why They Haven't Worked</i>	44
1. <i>"International Terrorism: the Definitional Quagmire:"</i>	45
2. <i>Evolution of Terrorism Agreements:</i>	48
IV. Proposed Legal Basis and Means for Dealing with International Terrorism: Extending Humanitarian Intervention to Provide for Protecting a Nation's Citizens Against International Terrorism; The U.S. Paradigm of Humanitarian Self-Defense.	59
A. <i>Customary International Law Providing For Humanitarian Intervention.</i>	60
1. <i>Pre-United Nations Charter</i>	60
2. <i>Post-United Nations Charter.</i>	63

<i>B. Analyzing the Teleological View: Protection of Human Rights and a Nation's Citizens, a Permissive or Obligatory Role of International Law and States?</i>	67
1. <i>Obligations by Nations to Protect Non-Nationals from International Terrorism: The Doctrine of State Responsibility</i>	79
2. <i>The Legal Duty by States to Prevent Terrorism and Terrorist Acts</i>	81
<i>C. The Failure of the U.N. Collective Security Process and the Practice of Nations to Protect its Citizen's Human Rights</i>	96
V. The Legality of the U.S. Paradigm of Humanitarian Self-Defense	103
VI. Conclusion	107

I. Introduction

A cross-section of the international community demonstrates that a majority of nations view the rationale offered by the United States for its missile strikes against alleged terrorist sites in Afghanistan and Sudan in August, 1998 as an over-extension of self-defense. Nonetheless, the United States has opted to utilize the provisions of Article 51 of the United Nations Charter as a basis for its actions. With a majority of the world community criticizing this approach, it is essential to review Article 51 of the Charter to determine why this world criticism exists. Several other legal means have been proposed as a basis for dealing with the problem of international terrorism. None of these other proposals has achieved international recognition as a legitimate basis for the use of force or solution to the problem of international terrorism. It is therefore necessary to examine these various justifications, as well as Article 51, to determine whether a viable legal framework for the strikes exists.

The United States is in a war against terrorism.¹ During the period of 1975 to 1985, there were approximately 6500 terrorist incidents worldwide. American citizens were victims in 2500 of those incidents.² From 1986 to 1997, there were 5416 more incidents worldwide.³

¹ The national security strategy for the United States, set out in October 1998, lists the strategic priorities for the future. Within the strategy, it states that America "will spare no effort to bring attackers to justice, ever adhering to our policy toward terrorists that 'You can run, but you cannot hide,' and where appropriate to defend ourselves, by striking at terrorist bases and states that support terrorist acts." The strategy is broken down into three levels of interest to provide guidance for prioritization of limited assets. Vital interests are at the top, important national interests are in the second tier, and humanitarian and other interests are at lower tier. Vital interests of the United States include, "physical security of our territory and that of our allies, the safety of our citizens, our economic well-being, and the protection of our critical infrastructures. We will do what we must to defend these interests, including –when necessary – using our military might unilaterally and decisively." A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY, THE WHITE HOUSE 1-9 (October 1998). This resolve has been demonstrated numerous times, from the 1986 Libyan raid, to the 1993 raid against Iraq, and the present missile strikes of last August.

² LCDR Michael Franklin Lohr, *Legal Analysis of U.S. Military Responses to State Sponsored International Terrorism*, 34 NAVAL L. REV. 1 (1985).

“Modern conventional war has become increasingly impractical. It is too destructive and too expensive.”⁴ “These governments see in terrorism a useful capability, a cheap means of waging war.”⁵

A recent demonstration of the U.S. role against international terrorism was shown by the August 20-21, 1998 missile strikes against suspected terrorist sites in Afghanistan and Sudan. The United States relied upon the theory of self-defense pursuant to Article 51 of the United Nations Charter to justify its actions.⁶ This legal concept has been used as the primary basis to justify United States use of force which violates the territorial integrity of another nation since the raid against Libya in 1986.⁷ However, as demonstrated below, this justification does not enjoy wide support in the international community, leading to the question: has the United States stretched Article 51 too far? With widespread criticism within the world

³ The State Department, *International Terrorist Incidents*, (visited Mar. 30, 1999) <<http://www.state.gov/www/global/terrorism/1997Report/>>.

⁴ Lohr, *supra* note 2, at 2.

⁵ *Id.* (citing: *Hearings on H.R. Res. 233; H.R. Con. Res. 339; H.R. 5612; H.R. 6311, Before the Legislation to Combat Int'l Terrorism Subcomm. on Int'l Sec. and Scientific Affairs and Int'l Operations of the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess., 25 (1983). (Statement of Brian M. Jenkins, Director, Security and Subnational Conflict Program, Rand Corp.).

⁶ “US strikes on terrorist facilities in Afghanistan and Sudan complied with international law and the rights of states to self-defence under the United Nations Charter, the US ambassador told the Security Council . . . he cited Article 51 of the UN Charter, which states that nothing ‘shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations.’” *Strikes Comply with UN Charter*, THE SENTINEL, ARMED FORCES SECTION, AT 4.

⁷ In addition to those actions listed in note 1, the United States has also used this claim in its intervention in Panama in 1991, and in Nicaragua in 1986. The majority of these actions were condemned by world leaders and international organizations. THE AMERICAN SOCIETY OF INTERNATIONAL LAW, AMERICAN SOCIETY OF INTERNATIONAL LAW NEWSLETTER, NOTES FROM THE PRESIDENT, 1, 2 (June 1993). Additionally, the NATIONAL SECURITY STRATEGY FOR A NEW CENTURY, *supra* note 1, reiterates this point. “As long as terrorists continue to target American citizens, we reserve the right to act in self-defense by striking at their bases and those who sponsor, assist or actively support them . . . Countries that persistently host terrorists have no right to be safe havens.” *Id.* at 16.

community for the recent actions and their legal basis, serious consideration of the legal basis and validity of the strikes is an important question. The purpose of this paper is to explore the present legal justifications being proposed for the use of force against international terrorism, and then explain the U.S. framework and its basis under international law. After a thorough examination the U.S. justification may thereafter enjoy greater international acceptance and validity. The challenge, when analyzing international law concepts and applying them to international terrorism, is applying legal principles designed to regulate the conduct of States and adapting them for use against non-State actors. State-sponsored terrorism is a rare entity in the 1990s. Thus, the challenge, applying these concepts to the recent missile strikes, is to adapt international law principles to deal with the violation of another State's territorial boundaries when acting against non-State actors. The focus of this paper is to bring together various international legal principles in search of a methodology, sound in its foundation, to deal with international terrorism. This author is not the first to attempt this endeavor, and surely will not be the last. This paper is intended to explain a rationale for the U.S. position and thereby provide an acceptable, legally supportable means of dealing with terrorism through the application of force.

A. International Support For United States Strikes

The international community's response to the recent United States missile strikes was split. Most United States allies voiced support for the action. German Chancellor Helmut Kohl fully supported the U.S. missile strikes stating, "the German government . . .

supports all measures which serve the fight against this scourge of the international community."⁸ "In Australia, Federal Opposition leader Kim Beazeley has agreed with Prime Minister John Howard that the U.S. strikes against Afghanistan and Sudan are justifiable."⁹ "Turkish foreign ministry said Friday Turkey strongly supports the United States' air strikes against the 'terrorist bases' in Afghanistan and Sudan."¹⁰

B. International Condemnation of the Strikes

Widespread outrage and protest to the strikes was also reported worldwide. "Calling the United States a power-obsessed 'war maker,' a widely read Malaysian newspaper on Saturday condemned America's missile attacks on Sudan and Afghanistan. 'It's action is nothing more than an international bully who muscles its will on the whole world,' said an editorial published in the government-linked New Straits Times daily."¹¹

⁸ *Germany Backs U.S. Missile Strikes in Sudan and Afghanistan*, DEUTSCHE PRESSE-AGENTUR, Aug. 21, 1998, at International News, at 1.

⁹ *The United States Says Its Military Strikes at Afghanistan and Sudan Complied With International Law*, AAP INFORMATION SERVICES PTY. LTD., Aug. 21, 1998, at Nationwide General News, Australian General News, at 1.

¹⁰ *Turkey Supports U.S. Airstrikes on Afghanistan, Sudan*, XINHUA NEWS AGENCY, Aug. 21, 1998, at Item No: 0821349, at 1.

¹¹ *Malaysian Press, Officials Condemn U.S. Missile Attacks*, AP WORLDSTREAM, at International News, Aug. 22, 1998, at 1. See "At least 21 people were killed and 30 wounded in the U.S. attack on what it called terrorist bases in Afghanistan, the Afghan Islam Press (AIP) agency reported Friday. AIP said a big anti-U.S. demonstration was staged in Kandahar, the seat of the Taleban in southern Afghanistan. Protests were also planned in other areas of Pakistan." *U.S. Strikes on Afghanistan Kill at Least 21, Injure 30*, DEUTSCHE PRESSE-AGENTUR, Aug. 21, 1998, at International News, at 1.

The international community also expressed more specific characterizations of the attacks as violations of international law:

Jakarta, August 24 . . . The missile attacks launched by the United States in Sudan and Afghanistan endanger the world and should thus be condemned by the United Nations, a legislator has said. 'The U.S. took the law into its own hands to take revenge, which is illogical,' Chairman of House Commission I on security and defence . . . Asiyah Amini, told ANTARA here today. Amini said the U.S. aggression is against international laws because it violated other countries territories.¹²

Many of the complaints used specific international legal terms and principles to support the individual State's or organization's objection under international law. "The leader of the fundamentalist Moslem organization Hamas, Shieckh Ahmed Yassin, Thursday described the U.S. military strike against alleged terrorist bases in Afghanistan and a suspected chemical weapons plant in Sudan as 'criminal and unfair aggression.'"¹³

Other nations utilized methods short of force but greater than public protest to register disagreement with the actions of the United States.¹⁴ Some States recognized the necessity for action by the United States while concurrently condemning the attacks:

¹² *Indonesia-U.S. Aggression Endangers the World*, ASIA INTELLIGENCE WIRE, BERNAMA, THE MALAYSIAN NATIONAL NEWS AGENCY, Aug. 24, 1998, at News, at 1.

¹³ *Hamas Condemns U.S. Strikes Against Sudan, Afghanistan*, DEUTSCHE PRESSE-AGENTUR, Aug. 20, 1998, at International News, at 1. *See also*:

Sudan's U.N. ambassador said Thursday he would lodge a formal complaint with the Security Council following U.S. strikes on what he said was a 'very small, humble' pharmaceutical factory in Khartoum. 'We're going to act within the civilized international law,' he said, 'we're intending to file a complaint to the Security Council because we think that we are under aggression for no reason.'

Sudan Outraged by U.S. Attack, Says Bombed Factory Wasn't for Chemicals, AP WORLDSTREAM, Aug. 20, 1998, at International News, at 1 [hereinafter *Sudan Outraged*].

¹⁴ *See Middle East Press Headlines*, AGENCE FRANCE PRESSE, Aug. 22, 1998, at International News, at 1-3:

Malaysia has joined other member countries of the Organization of Islamic Conference (OIC) in supporting Sudan's call for a convening of a special session of the United Nations Security Council to discuss the missile strikes by the United States on an alleged terrorist target in Sudan. Foreign Minister Datuk Seri Abdullah Ahmad Badawi said Malaysia felt that it was appropriate for a special session to be convened as attention should be drawn to vital issues related to the question of terrorism and also the issue of U.S. action in violating the sovereignty of another country. Certainly the U.S. action violated the sovereignty of that independent nation which is also a member of the United Nations. He said that Malaysia was concerned that the missile strikes by the U.S. would further trigger terrorist activities which would have far worse consequences."¹⁵

Importantly, some traditional allies condemned the attacks:¹⁶

America's rationale for bombing alleged terrorist targets in Afghanistan and Sudan last week is wearing thin by the day, and its credibility taking a

IRAN DAILY – Iran Criticizes Attacks on Sudan, Afghanistan. Foreign Ministry spokesman Mahmoud Mohammadi condemned the U.S. air raids against the Sudan and Afghanistan here Friday. AL-ARAB AL-YAWM—Arab, Moslem Anger Over U.S. Strikes on Sudan and Afghanistan. Arab and Islamic capitals witnessed Friday a wave of popular demos in protest at U.S. strikes on Sudan and Afghanistan. AN-NAHAR - Bin Laden says war has started. AS-SAFIR – Sudan to Complain the Security Council. Sudan retaliated to the American attack which left one person dead and seven injured by severing diplomatic relations with the United States and filing a complaint with the U.N. Security Council. AL-AYYAM – Leadership Expresses Concern Over U.S. Raids. President Yasser Arafat chaired the weekly meeting of the cabinet yesterday evening where he expressed the concern of the Palestinian leadership at the U.S. raids on Afghanistan and Sudan.

Id.

¹⁵ *Malaysia Supports Sudan's Call for the Convening of a Special Session*, ASIA INTELLIGENCE WIRE, BERNAMA, THE MALAYSIAN NATIONAL NEWS AGENCY, Aug. 23, 1998, at News, at 1.

¹⁶ *See also U.S. Criticized for Attacks on Sudan, Afghanistan*, AP WORLDSTREAM, Aug. 21, 1998, at International News, at 1:

Libyan leader Moammar Gadhafi . . . led hundreds of chanting Libyans in a Friday rally condemning U.S. missile strikes on Sudan and Afghanistan. The sentiment was echoed around the Middle East, where leaders and many citizens roundly criticized Thursday's American attacks . . . Much of the harshest criticism came from countries opposed to the United States, but even in perceived U.S. allies like Saudi Arabia, some people said the attack would add to and not lessen the threat against Americans.

Id.

battering. This week, the Arab League formally asked the Security Council to launch a probe. The application was moved – and this is very telling – by Kuwait which owes its existence to America.¹⁷

C. Conclusions to be Drawn from the World Community's Response.

The world community's response showed that a majority of nations condemned the U.S. actions on principles of self-defense. As will be discussed below, this condemnation is not surprising in light of traditional concepts and understandings of the parameters of self-defense. The United States has previously explained its legal position for similar actions in greater detail. The U.S. Ambassador reflected the genesis of this position in his comments after the Israeli raid at Entebbe. The Ambassador began by highlighting the traditional peace-based approach to interpreting the U.N. Charter, and in particular, the provisions of Article 2(4) prohibiting the use of force in international relations. He did so by stating that while the Israeli intervention was a temporary breach of the territorial integrity of Uganda, such violations are normally not permitted under the U.N. Charter.¹⁸ The Ambassador then set forth the inherent conflict between a peace-based approach to the Charter and a justice-based approach, which focuses on the Charter's provisions to protect fundamental human rights. He pointed out that there exists a well-established right under international law to use limited force to protect a nation's nationals from imminent threats of danger that *flows from*

¹⁷ Haroon Siddiqui, *Suspicion Grows Over Missile Attacks*, TORONTO STAR, Aug. 27, 1998, at A26.

¹⁸ See U.N. Doc. S/PV.1941, at 31-32 (July 12, 1976). See also 73 AM. J. INT'L L. at 112 (1979). (summarizing the U.S. Ambassador's comments).

the inherent right of self-defense.¹⁹ This position, focusing on a justice-based approach, was a turning point in U.S. policy and interpretation of the Charter and set the stage for the modern U.S. paradigm of *humanitarian self-defense*.²⁰ This new paradigm was used for the first time in 1986 during the raid against Libyan terrorist facilities in response to acts of terrorism against the U.S. sponsored by the Libyan government. The U.S. raid against Libya in 1986 provides the same justification expressed during the Entebbe debate in the United Nations, and sets the framework for the current U.S. position. “[w]hen our citizens are abused or attacked anywhere in the world, on the direct orders of a hostile regime, we will respond . . . Self-defense is not only our right, it is our duty.”²¹ The Libyan raid marked the turning point in an emergent U.S. policy towards terrorism, which focused on humanitarian principles, or a justness-based approach to Charter interpretation.

The question thereby becomes, is this U.S. justification supportable under international law? This paper will attempt to provide a comprehensive analysis to help explain the world reaction, and then subsequently provide the legal framework and analysis that supports and explains the U.S. position. Initially, this will be accomplished by examining general, international law prohibitions and limits for the use of force. This examination will also include an analysis of proposed legal justifications posited to validate the use of force under the present umbrella of the United Nations Charter, and its general prohibitions on force in international relations. Subsequently, an examination of specific attempts to regulate

¹⁹ *Id.* (emphasis added).

²⁰ The U.S. had repeatedly condemned Israel in its fight against terrorism in the 1960s and 1970s because it focused on a peace-based interpretation of the Charter. *See infra* note 56 and accompanying text.

²¹ Speech by President Ronald Reagan, *International Terrorism*, U.S. DEPT. OF STATE BUREAU OF PUBLIC AFFAIRS, SPEC. REP. NO. 24, at 1, 1986. (This speech was issued as the justification for the U.S. strikes against Libya in 1986 for its pattern of terrorist activities against U.S. citizens).

international terrorism through multilateral agreements will be examined. The intent of these agreements will be explored as well as their shortcomings. Finally, the U.S. justification will be explored, and this author will attempt to explain the U.S. rationale and its validity for the recent U.S. missile strikes.

D. A Legitimate Basis Exists under International Law to Violate the Territorial Integrity of Another Nation to Protect the Citizens of a Nation State.

A thorough examination will reveal that Article 51 of the United Nations Charter, *in its traditional sense*, was never designed to legitimize the use of force as applied by the United States in the recent missile strikes. Additionally, each of the alternative legal bases proposed for this type of force falls short in either its analysis or application. Furthermore, examination of means other than force to deal with international terrorism reveals these methods are also ineffectual. However, a potential theory for legal validity for the recent strikes is obtainable. This author concurs in the United States' position that the pre-Charter right of forcible self-help to protect fundamental human rights of a nation's citizens was never subsumed by the passage of the United Nations Charter and can be legitimately extended to validate the recent missile strikes. Alternatively, the provisions of Article 51, through the practice of nations, has evolved from its customary parameters to incorporate the doctrine of forcible self-help to protect nationals. This evolved doctrine is therefore a legitimate use of force under the Charter.

A cursory review of legal periodicals and texts will reveal that numerous scholars and jurists have debated post-Charter bases for the use of force by nation States. They have done so in an attempt to legitimize State practice involving force in the face of Article 2(4) of the Charter. A thorough examination demonstrates that traditional international legal concepts and principles have been stretched to the point that the various concepts have merged together and the lines separating these principles have blurred. It is essential, in the field of law, that precision and the legal lexicon afforded to terms and principles remain true to provide for certainty and predictability. This enables nation States to reach mutual agreements and understandings based on a common set of terms and principles. Therefore, this author will attempt to set forth, define, and explain legal concepts involving the use of force *in their traditional sense*, which various proponents have attempted to extend to legitimize the use of force under the Charter. The weaknesses of these methods will be analyzed, and this author will show that they are ill suited to legitimize the 1998 missile strikes. Subsequently, this author will examine the current U.S. paradigm, articulated after the 1986 Libyan raid, as a legitimate extension of the right of humanitarian intervention to protect a nation's citizens. This paradigm is separate from the customary international concept of self-defense, but flows from the inherent right of a nation to defend itself and its citizens against aggression. The final section will set forth the arguments and principles which support the extension of Article 51 from its conventional limits to adapt to the terrorist threat of the 1990s. This alternative U.S. paradigm has not been independently titled by the United States. This author, however, proposes it be termed *humanitarian self-defense*, separate and distinct from the laws of war²², premised on the customary practice of nations to

²² The author does not propose that this paradigm is directly linked to the humanitarian principles set forth in the Geneva Conventions or Hague Regulations, nor their rules regarding self-defense. The term *humanitarian*

protect their citizens from harm. It is recommended that it be given a title as a separate legal justification not included within the customary understanding or principles of the customary law of self-defense. The purpose of giving the justification a separate title is to reinforce that this paradigm is separate from the traditional concept of self-defense. Rather, the paradigm is an extension of the customary doctrine of self-defense which has evolved from the customary right of a nation to protect its citizens. Thus, through the practice of nations, this extension has been incorporated into and has expanded the parameters of Article 51 of the United Nations Charter.

II. Conventional Legal Methods and Means Advocated for Dealing with the Problem of International Terrorism

A. Four Legal Bases Have Been Advanced to Justify Use of Armed Force Against International Terrorism in the Sovereign Territory of Other Nations.

To preface any discussion about the use of force in international relations, the United Nations Charter's general prohibitions on the use of force must be the starting point. Article 2, Section 4 of the United Nations Charter requires member states to respect the territorial

self-defense is specifically used to demonstrate the relationship between the U.S. paradigm, pre-Charter practice of self-help to protect a nation's citizens, and a justice-based interpretation of the U.N. Charter which focuses on protection of human rights. This practice was traditionally labeled as a form of humanitarian intervention which is discussed below.

integrity and political independence of other nation states, and to refrain from the use of force or threat of the use of force in international relations.²³ Article 2, Section 3 also requires members to settle international disputes by peaceful means in a manner that will not endanger international peace and security.²⁴ To reinforce that these principles are more than mere treaty obligations, General Assembly Resolution 2625 declared the principles stated in Article 2 to be basic principles, or customary international law.²⁵ This umbrella of a general prohibition against force in international relations is the cornerstone to analyzing modern attempts to use force against international terrorism. The difficulty in applying these principles directly to terrorism is that often, terrorist activities are difficult to trace to individual state sponsorship. Because international law has traditionally regulated the conduct of states vis-a-vis each other, applying international legal principles to non-state actors is substantially more difficult. As an example, in the case of the recent missile strikes, the United States' international dispute with the terrorist organizations was tangentially related to the nation state whose territorial boundaries we violated. The terrorists were not state-actors of Sudan and Afghanistan, but were using these sovereign territories as bases of support. It would be, of course, easier to resolve this legal issue if there was proof of state sponsorship to the terrorists. The difficulty in applying international rules, as in the case of the recent strikes, occurs when there is covert support of terrorist activities, or the state in which the terrorists reside is unable or unwilling to take action against the terrorist organizations. The provisions of the U.N. Charter, when it was written, were simply not

²³ U.N. CHARTER art. 2, para. 4.

²⁴ *Id.*, art. 2, para. 3.

²⁵ G.A. Res. 2625, *reprinted in* 13 UNITED NATIONS RESOLUTIONS, SERIES I; GENERAL ASSEMBLY 337 (Dusan J. Djonovich ed., 1976).

designed to deal with the concept and organization of modern terrorist groups or their actions.

With these difficulties in mind, the expansion of conventional legal doctrines to cover terrorist activities is understandable. Four legal bases have been proposed to justify the use of force against international terrorism. These bases are the inherent right of self-defense under Article 51 of the United Nations Charter;²⁶ acts of reprisal against illegal acts of terrorism;²⁷ definitionally categorizing the use of force, in response to terrorism, as not being directed at the territorial integrity or political independence of another State so that the United Nations Charter prohibitions do not apply;²⁸ and utilization of the United Nations collective security process to permit armed force under Chapter VII of the Charter.²⁹

1. Inherent Right of Self-Defense, Article 51, U.N. Charter.

The missile strikes against the terrorist camps in Sudan and Afghanistan occurred approximately two weeks after the bombings of the American embassies in Dar es Salaam,

²⁶ See A. Thomas & A. Thomas, *The Dominican Republic Crisis 1965*, in IXTH HAMMARSKJOLD FORUM 13 (1967)..

²⁷ See, e.g., William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 VA. J. INT'L L. 421 (1990). See also *infra* notes 31 to 72 for a detailed discussion of these arguments.

²⁸ See *infra* notes 120 to 136 for an in depth discussion of these arguments.

²⁹ See U.N. CHARTER, arts. 43-49. See also D'Angelo, Note, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and its Legality under International Law*, 21 VA. J. INT'L L. 485, 487-91 (1980).

Tanzania and Nairobi, Kenya.³⁰ The world community registered objections and reservations for the strikes, as highlighted above, because they resembled reprisals for the past bombings rather than legitimate acts in self-defense. Ironically, the United States claimed an identical self-defense basis for its actions that Israel attempted to claim before the U.N. Security Council in its fight against terrorism in the 1970s and 1980s. The U.S. often sided against Israel, and its explanation for its legal basis before the Security Council, in Israel's fight against terrorism during this period.³¹ A review of the traditional, or customary, law of self-defense demonstrates that the recent missile strikes are an overextension of customary principles. Thus, it is unsurprising that the world community condemned the U.S. strikes under the basis of Article 51 of the U.N. Charter.

In order to understand the parameters of self-defense under Article 51, it is first necessary to understand the pre-Charter rules and practice as applied to the law of self-defense. During the 19th century, the concept of self-defense was mixed with the concept of self-preservation.³² The concept of self-preservation is broader than that of self-defense because it bases its justification and legality for actions on necessity as applied by the State claiming

³⁰ See U.N. Press Release SC/6559, available at <http://www.un.org/News/Press/docs/1998/19980813.sc6938.html>.>; *Sudan Outraged*, *supra* note 13.

³¹ O'Brien, *Supra* note 27, at 422. Israel's justification for the majority of its actions were premised on the basis of self-defense in response to a longstanding pattern of terrorist activities against Israel by Lebanon. *Id.* at 444-463.

³² Claude Humphrey Meredith Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455, 461-62 (1952).

self-preservation. It therefore does not base legality on a set principle of law, but on the rationale of necessity of the nation itself.³³

In municipal law, as Westlake (citation omitted) pointed out, it is only self-defence and not self-preservation which may justify an otherwise criminal use of violence against another person; e.g. the English case of *Regina v. Dudley and Stephens* (citation omitted) where two shipwrecked sailors after many days without food eat the third to keep themselves alive and were convicted of murder. So too in international law it came to be accepted that only acts of self-protection against a threatened injury would excuse a violation of the independence of another State. The decisive point, perhaps, was the incident of the *Caroline* in 1837.³⁴

Thus, the incident of the *Caroline* became the standard, legally acceptable definition and limitation to the rights of self-defense, or self-protection, in intervention which would shape the law and practice of states in the future.

³³ *Id.* at 462. Waldock states,:

self-preservation might allow one State to do a grave wrong to another on the plea of saving its own military, economic or political interests. It is a concept which cannot be kept within proper bounds, as is witnessed by Germany's invasion of Luxembourg and Belgium in 1914 on the plea of self-preservation, although she was under no immediate threat of attack by any other State.

Id.

³⁴ *Id.* See also A. THOMAS & A. THOMAS, NON-INTERVENTION, 81-85 (1956). The Thomases state:

To recognize a right of self-preservation would be to reverse a fundamental base of international law and emphasize the preservation of the individual state rather than the preservation of the family of nations. It might be that a state, like an individual, when faced by a situation which has been created by another state and which it believes to be against its best interests, will act instinctively to preserve itself, even to the extent of violating its international legal obligations to its neighbors . . . But that a state or individual acts in such a manner does not mean that its act is legitimate. When one reasons in this fashion it becomes plain that there is no broad right of self-preservation recognized by principles of international law. Moreover, since there is no such right, there can be no right of intervention for such a purpose.

Id. at 84-85.

The *Caroline* incident, although it occurred over one-hundred fifty years ago, still applies as the standard for using force in self-defense, particularly anticipatory self-defense.³⁵ The incident involved the United States, a group of dissidents from Canada and Great Britain.³⁶ In 1837, colonial Canada rebelled against Great Britain. American sympathizers offered supplies and equipment to the rebels. The American ship *Caroline* was docked in the United States at Fort Schlosser but had been carrying men and supplies to Canada from the United States previously. American support to the Canadian uprising could not be suppressed by the U.S. government, leading British and Canadian agents to cross the border into the United States. Once in the United States, the British loyalists forcibly boarded the *Caroline*, set her on fire, and sent her adrift over Niagara Falls. The attack resulted in U.S. deaths, which prompted a claim of reparation by the U.S. against Great Britain. Great Britain asserted that the acts were done in self-defense. This resulted in a series of correspondence between Secretary of State Daniel Webster and the British Minister in Washington.³⁷ In the resulting correspondence, Secretary Webster set forth the requirements for self-defense, which became the standard under international law.

Secretary Webster stated that a State, to prevail under a claim of self-defense, must show that the “necessity of that self-defense is instant, overwhelming, leaving no choice of means, and no moment for deliberation.”³⁸ Thus, the key factor of necessity for self-defense in

³⁵ Waldock, *supra* note 32, at 462; THOMAS, *supra* note 34, at 80. See also *supra* notes 60 to 69 and accompanying text.

³⁶ See JOHN BASSETT MOORE, 2 DIGEST OF INTERNATIONAL LAW 409-414 (1906); R. Y. JENNINGS, 32 AMERICAN JOURNAL OF INTERNATIONAL LAW 82-89 (1938) (providing a detailed explanation of the *Caroline* incident).

³⁷ *Id.*

³⁸ MOORE, *supra* note 36, at 412. (See also, THOMAS, *supra* note 34, at 80).

customary international law required a close nexus in time between the actual, or threatened, attack and the response, such that no ability to resort to other means short of force were available. This concept differed significantly from the practice of reprisal, as will be discussed in detail below.³⁹ The key distinction between self-defense and reprisal is that self-defense was viewed as being preventive and did not include the right to exact reparation for injury actually done to the State. Rather, self-defense sought to protect the State from immediate threats or uses of force.⁴⁰ Therefore, applying the rules to the *Caroline* incident, Britain's action could only be justifiable as a precaution against further injury and not as retaliation for past injury. While these distinctions may sometimes be difficult to draw, they are nonetheless essential concepts which have a large bearing on the legitimacy of State actions involving the use of force. Although Great Britain and the U.S. disagreed about the facts of the *Caroline* incident, they did agree that the principles set forth by Secretary Webster were the principles to be applied in self-defense cases.⁴¹ "It is commonly accepted today that the proper limits of the plea of self-defence are correctly stated in the above principles and that, in the particular circumstances, the destruction of the *Caroline* fell within these principles."⁴² Therefore, the *Caroline* principles set forth the requirements for self-defense, and also included the right of anticipatory self-defense in very limited circumstances.

³⁹ See notes 73 to 118 and accompanying text.

⁴⁰ Waldock, *supra* note 32, at 464.

⁴¹ Waldock, *supra* note 32, at 463.

⁴² *Id.*

This customary right of self-defense was not modified by the Covenant of the League of Nations or the Kellogg-Briand Pact.⁴³ “Neither the Covenant nor the Pact mentioned self-defense. But it was universally agreed that resort to war – and therefore any lesser use of force – in self-defence was not restricted by either instrument.”⁴⁴ The applicable limits for a valid claim of self-defense were also not modified by the Covenant and Pact and remained the *Caroline* limits set forth above.⁴⁵

The need to keep self-defence within the strict limits of the doctrine in the *Caroline* has been demonstrated only too often in recent history. Aggressive war having become illegal, every aggression is now represented to be self-defence: - e.g. Japan in Manchuria, Italy in Abyssinia, Russia in Finland. The plea of self-defence was disallowed by the League in all these cases as it was also by the Nuremberg and Tokyo Tribunals in regard to the numerous invasions undertaken by Germany and Japan. The Nuremberg Tribunal

⁴³ Waldock, *supra* note 32 at 476-477. See also JULIUS STONE, AGGRESSION AND WORLD ORDER, at 32-33 (1958). “It was generally agreed among the Signatories that the Pact did not preclude the rights of legitimate defence” *Id.* The Covenant of the League of Nations and Kellogg-Briand Pact would appear at first glance to severely limit the ability of a nation to take any forcible action in international relations. Both were passed after the Great War to end all wars, World War I, and sought to curtail the massive human suffering experienced under the Just War Doctrine of warfare. [Recall that the Just War doctrine focused on the motive, or justness, of the conflict to determine its legality under international law]. While the League and Pact placed limitations on the use of force between nations in their international relations, moving from the justness of war (*jus ad bellum*) to the outlaw of war (*jus contra bellum*), many nations were reluctant to place any limitation on the inherent right of all nations to defend themselves from attack. They were willing to sign onto the concept that War was an entity to be severely regulated and curtailed, but were also pragmatic enough to realize that, with no enforcement mechanism, self-preservation depended upon the ability to defend ones own nation. See Waldock, *supra* note 32, at 456-494 (for a discussion of the Just War concept, the Covenant of the League of Nations, and the Kellogg-Briand Pact).

⁴⁴ *Id.* at 476.

The Covenant of the League of Nations expressly stipulated that in the event states refused to comply with international law to submit controversial issues to the organs of pacific settlement which the League provided, or if they preferred to ignore the findings and orders of such bodies, and the League proved unable to settle the dispute, the right of self-help remained a legal international law right to all members.

THOMAS, *supra* note 34, at 350. (citing Covenant of the League of Nations, art. 15, para 7).).

⁴⁵ Waldock, *supra* note 32, at 478.

expressly reaffirmed that the proper limits of the right of self-defence are those stated in the *Caroline*.⁴⁶

Because the rules and limits of self-defense were not modified by the League of Nations Covenant or the Kellogg-Briand Pact, it must be determined whether or not the passage of the United Nations Charter changed the customary rules regarding self-defense.

As stated earlier, the United Nations Charter is the modern foundation of international law with respect to the use of force between nations. Any analysis of self-defense in the modern era must begin with the provisions of the Charter, and specifically focus on the provisions and interpretation of Article 51 of the Charter.

Having witnessed the horrors and brutality of the Second World War, the drafters of the Charter wrote the document 'to maintain international peace and security.' The guiding principle behind the Charter is that international aggression should be avoided whenever possible and condemned as a violation of international law.⁴⁷

Article 2(4) sets forth the general prohibition concerning the use of force as specified above.⁴⁸ An exception to this prohibition is contained in Article 51 of the Charter:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. (Text omitted).⁴⁹

⁴⁶ *Id.* at 478 (citing THE TRIAL OF GERMAN MAJOR WAR CRIMINALS, THE JUDGMENT (COMMAND PAPER 6964) at 28 (1946)).

⁴⁷ Stuart G. Baker, Note, *Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GA. J. INT'L & COMP. L. 99, 106 (1994).

⁴⁸ See note 23 and accompanying text.

⁴⁹ U.N. CHARTER, art. 51.

The key phrase in Article 51, and its resultant impact on the customary law of self-defense, is “armed attack.” This phrase has been the source of controversy and debate over what the present limits are within the doctrine of self-defense.⁵⁰ “Two main schools of thought have developed in past decades regarding the meaning of ‘armed attack’: one advocates a restrictive interpretation of the phrase, while the other argues for an expansive view of the term.”⁵¹ The restrictive view holds that Article 2(4) limited or modified the customary law of self-defense under *Caroline* to allow self-defense only in cases of an actual armed attack.⁵² The expansive view rejects this literalist interpretation of Article 2(4) and argues that the inherent right of self-defense named in the Charter is the *Caroline* limitations, which also provided for anticipatory self-defense.⁵³ To determine the meaning of “armed attack” and the limits of self-defense under the Charter, several sources are critical and have decisive impact on the term. The decisions of the International Court of Justice provide strong authority for the limits of self-defense.⁵⁴ Additionally, the U.N. Security Council determinations made regarding the limits of self-defense are authoritative interpretations of

⁵⁰ Baker, *supra* note 47 at 107, (citing Norman Menachem Feder, Note, *Reading the U.N. Charter Connotatively: Toward a New Definition of Armed Attack*, 19 N.Y.U. J. INT’L L. & POL. 395, 412-418 (1987); Gregory Francis Intoccia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT’L L. 185, 203 (1987)).

⁵¹ Baker, *supra* note 47, at 109 (citing Feder, *supra* note 50 at 402-412).

⁵² DEREK W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 188 (1958); Baker, *supra* note 47, at 109.

⁵³ BOWETT, *supra* note 52, at 188; Baker, *supra* note 47, at 109; Michael J. Levitin, *The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention*, 27 HARVARD INT’L L. J. 621, 631 n. 38 (1986). (As discussed in the previous section, the idea behind anticipatory self-defense was that a nation did not have to wait until it was actually under fire to exercise its right to defend itself. Nothing in the customary right of self-defense required a nation to wait until it was actually invaded or under fire before exercising its right to protect its territory and citizens. However, there were strict requirements that any actions taken in anticipation of attack had to be immediately necessary to prevent actual harm.)

⁵⁴ LOUIS HENKIN, RIGHT V. MIGHT, USE OF FORCE: LAW AND U.S. POLICY, 49 (1989). Henkin states, “a decision of the International Court of Justice is not binding on states other than the parties to the case, but judicial decisions are ‘subsidiary means for the determination of rules of law’ (article 38 of the Statute of the Court), and decisions of the court are highly authoritative.” *Id.*

the Charter.⁵⁵ The background to the passage of the Charter also provides significant guidance about the intent of the drafters.

The International Court of Justice in the Corfu Channel Case⁵⁶ supports the idea that the limits of self-defense under the Charter include anticipatory self-defense under the *Caroline* limits, which a strict interpretation of “armed attack” would not allow.

The intention must have been, not only to test Albania’s attitude but at the same time to demonstrate such force that she would abstain from firing again on passing ships. Having regard, however, to all the circumstances of the case . . . the Court is unable to characterize these measures taken by the United Kingdom as a violation of Albania’s sovereignty.⁵⁷

The International Court of Justice specifically found that the British ships were within their rights. Having their guns manned and ready to fire in anticipation of attack was acceptable because of the prior actions of Albania. The Court based this decision on the prior aggressive acts by Albania toward Great British shipping. Thus, it held that the British need not have waited for an actual armed attack by Albanian gun positions before it could act in proportional response in anticipation of further attacks. Therefore, the Court upheld Great Britain’s use of force in anticipation of attack as being consistent with Article 2(4) of the Charter. It did so, however, by specifically focusing on the limited nature of the response (proportionality) and necessity of the action, essentially reiterating the *Caroline* standards.

⁵⁵ Levitin, *supra* note 53, at 628 n. 27 (citing I. BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 696-697 (1979); Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AM. J. INT’L L. 1, 6 (1970)).

⁵⁶ See notes 102 to 109 and accompanying text discussing the facts of the Corfu Channel Case. (The Corfu Channel Case involved a freedom of navigation exercise by the British Navy against Albanian coastal gun positions in the Corfu Channel).

⁵⁷ Waldock, *supra* note 32, at 500 (citing I.C.J. REPORTS 31 (1949)).

Reviewing actions by the U.N. Security Council, by its interpreting State acts under the provisions of the Charter, also leads to the conclusion that Article 51 provides for anticipatory self-defense, but that the limits of anticipatory self-defense are as set forth in the *Caroline*. William V. O'Brien's comprehensive article on reprisals, deterrence and self-defense in counterterror operations catalogues in chronological fashion the Security Council responses to Israel's claims of self-defense in actions against terrorist organizations.⁵⁸ From the period 1971 to 1975, "Israel claimed that its attacks on the PLO in Lebanon and Syria were justified as self-defense. These self-defense measures were necessitated by the fact that Lebanon and Syria failed, under the doctrine of State responsibility, to prevent their territory from being used by a third party as a base for attacks on another State."⁵⁹ In responding to the Israeli claims, the Security Council specifically found that there was, "no immediate and indispensable necessity for the Israeli action, following the criteria for the use of force set out by Daniel Webster in the *Caroline* incident."⁶⁰

⁵⁸ See *supra* note 31.

⁵⁹ O'Brien, *supra* note 27, at 433-434.

⁶⁰ *Id.* at 437.

In the debate on S.C. Res. 313 of February 28, 1972, Ortiz de Rozas of Argentina denied that Israel's incursion into Lebanon met the test of the 'principle of need.' He asserted: In accordance with the principle of need as commonly proclaimed in doctrine and by treatise writers, it is necessary that such measures be indispensable and immediate: there must be no alternative and no time must pass in deliberating or reflecting on the desirability of a reaction. This means that the reaction must immediately follow the illegal attack.

27 U.N. SCOR 1644th mtg. at 3, U.N. Doc. S/PV.1644 (1972). (Pull SC Res)

In 1978, during the Litani Operation,⁶¹ Israel characterized its actions as preventive measures rather than reprisals for the Country Club raid.⁶² “The Israeli justification was explicitly rejected by most Security Council members . . . [N]umerous representatives charged that Israel’s action was premeditated, implying that self-defense measures must not be premeditated.”⁶³ During the mini-war of 1981, the Security Council condemned numerous Israeli actions against the PLO, and in denying Israel’s claims the Council again used the *Caroline* incident limits for self-defense.⁶⁴ The 1982 Lebanon War, in which Israel invaded Lebanon, was characterized by Israel as, “an act of legitimate self-defense necessitated by a long-standing terrorist war waged from that country”⁶⁵ The Israeli self-defense argument was again rejected by the Security Council.⁶⁶ “The principal theme in the June debates during the early days of the war was . . . that the Israeli action was a

⁶¹ The 1978 Litani Operation was the largest and longest counterterror operation prior to the 1982 war in Lebanon. It was sparked by one of the bloodiest terrorist attacks carried out by the Palestinian Liberation Organization. On March 11, 1978, thirteen PLO terrorists infiltrated by sea between Haifa and Tel Aviv. After murdering a U.S. Jewish woman photographer on the beach, they seized a bus and engaged in a running gun battle with security forces to a point just north of Tel Aviv, near the Country Club resort. Thirty-two civilians, including women and children, were killed before nine terrorists were killed and two captured . . . On the night of March 14-15, 1978, two or three IDF infantry brigades (ten to twenty-two thousand men), supported by tanks, invaded Lebanon and attacked major PLO camps. Israeli gunboats shelled PLO targets in Tyre and Said as the Israeli Air Force hit PLO targets in both those two cities and Beirut . . . ultimately, the Israeli forces advanced to the Litani River. *Id.* at 446.

⁶² *Id.* at 448. (citing 33 U.N. SCOR 2072d mtg. at 1-2, U.N. Doc. S/PV.2072 (1978)).

⁶³ *Id.* at 448-449, (citations omitted).

Ambassador Husson of France stated: While it is clear that France regards terrorist acts as totally reprehensible, it is also clear that we have the same attitude towards acts of reprisal. Attempts to justify or explain the one by the other necessarily lead to an unacceptable situation of constant escalation, causing much loss of human life and challenging and endangering international security.

Id. at n.134. (citing 33 U.N. SCOR 2072d mtg. At 5, U.N. Doc. S/PV.2072 (1978)).

⁶⁴ *Id.* at 450-453.

⁶⁵ *Id.* at 455 (citing 37 U.N. SCOR 2374th mtg. at 27-28, U.N. Doc. S/PV.2374 (1982)).

⁶⁶ *Id.* at 456.

premeditated attack”⁶⁷ The 1985 Israeli Tunis Raid in response to a terrorist attack against Israelis in Cyprus was condemned by the Security Council in Resolution 573.⁶⁸ “Israel’s argument of self-defense against terrorism was dismissed without serious discussion.”⁶⁹

A review of the records of the San Francisco Conference supports the fact that the customary international law limits of self-defense were preserved with the passage of the Charter.

At the Inter-American Conference on 3 March 1945, the Act of Chapultepec was signed establishing a collective defense system. There was concern among the delegates to the San Francisco Conference that the UN Charter might adversely affect this relationship. Article 51 was drafted to clarify this issue. Originally it was proposed that the article be placed in Chapter VIII of the Charter, which would have limited the right of collective self-defense to regional organizations and would have required prior approval by the Security Council. In the debate that ensued, the delegates intended clearly that the customary right of self-defense not be altered. As a result article 51 was moved from Chapter VIII of the Charter to Chapter VII.⁷⁰

To summarize the law of self-defense as it applies today, we must look to the principles set forth in the *Caroline* incident.⁷¹ The necessity for self-defense must be instant,

⁶⁷ *Id.* (citing 37 U.N. SCOR 2375th mtg. at 63-65, U.N. Doc. S/PV.2374 (1982) (remarks by Ambassador Zaki (Egypt)); 37 U.N. SCOR 2377th mtg. at 4, U.N. Doc. S/PV.2377 (1982) (Pinies (Spain)); 37 U.N. SCOR 2379th mtg. at 31, U.N. Doc. S/PV.2379 (1982) (Nowak (Poland))).

⁶⁸ *Id.* at 460.

⁶⁹ *Id.* at 461.

⁷⁰ LTCOL RICHARD J. ERICKSON, LEGITIMATE USE OF FORCE AGAINST STATE-SPONSORED TERRORISM 140-141 (1989) (citing JAMES L. BRIERLY, THE LAW OF NATIONS 416-419 (Sir Humphrey Waldock ed., (1963))).

⁷¹ Robert J. Beck & Anthony Clark Arend, *Article: "Don't Tread on Us": International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L.J. 153, 193 (1994).

In studies of the *jus ad bellum*, for example, publicists have generally agreed on what is denoted by the term ‘anticipatory self-defense.’ Accordingly, they have devoted relatively little intellectual effort to definitional disputes. Moreover, in their

overwhelming, leaving no choice of means and no moment for deliberation. There is a small exception for anticipatory self-defense if the situation requiring immediate action meets the *Caroline* parameters. This customary international principle of law was not supplanted by the passage of the U.N. Charter. The background leading to the passage of the Charter, coupled with the International Court of Justice opinions, read in context with the decisions of the U.N. Security Council, demonstrate that the *Caroline* principles are the modern law of self-defense. Applying these standards to the actions by the United States in the recent missile strikes show that they do not fall within the customary principles of the *Caroline*. The strikes were not in direct response to the bombings, leaving no choice of means and no moment for deliberation. Rather, they were “premeditated,” as the Israeli attacks against the PLO were characterized in the 1970s and 1980s. Thus, it is not surprising that the world community was against the U.S. action. This leads to the natural conclusion that is consistent with the language of Article 51, that the *inherent right of self-defense* is that which States owned prior to the passage of the Charter. One author has stated, “the right of self-defense belongs to member States not by grant under the Charter, but by virtue of a pre-existing customary and natural right long recognized by international law.”⁷²

consideration of anticipatory self-defense’s permissibility, scholars have commonly agreed on what fundamental questions are legally significant and therefore worthy of explanation. Virtually all who have written on the subject, for example, have accepted a priori the importance of the *Caroline* case and the legal criterion of ‘imminent threat.’

Id.

⁷² ERICKSON, *supra* note 70, at 140 (citing LCDR Bruce Harlow, *The Legal Use of Force Short of War*, 92 NAVAL INSTITUTE PROCEEDINGS 88, 93 (1966)). See also Derek W. Bowett, *The Use of Force for the Protection of Nationals Abroad*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE, 39 (A. Cassese ed., 1986). “The evidence of the intention of the framers of the Charter, drawn from the *travaux préparatoires*, indicates that what was intended was to preserve the pre-existing, customary right of self-defence: indeed the word ‘inherent’ suggests precisely that.” *Id.* at 40 (citations omitted).

2. *Peacetime Reprisal.*

Peacetime reprisal is another basis tendered to legitimize the use of force against international terrorism. It is also an overextension, and thus an improper basis, under international law as will be demonstrated below.

Reprisal was a concept developed in medieval times. A sovereign granted private reprisals to individuals to redress grievances against another sovereign's citizens.⁷³ For private reprisals to be valid, the injustice must have been suffered in the foreign sovereignty, and the foreign sovereignty must have refused redress.⁷⁴ "The basis of this form of reprisals was a communal responsibility for injuries done to foreigners."⁷⁵ The private citizen's sovereign then allowed its citizen to act under the color of the sovereign to claim property in response to the previous wrong. This practice led to many abuses, but was the foundation, which developed in the 19th century, for the right of States to protect their citizens abroad.⁷⁶ "By the 19th century all reprisals are public reprisals taken by the state itself and any international wrong done to the state or its nationals is a just cause for reprisals."⁷⁷ In the 19th century, the law of reprisals held that a reprisal was generally not legitimate unless a State

⁷³ Waldock, *supra* note 32 at 458.

⁷⁴ *Id.* See also EVELYN SPEYER COLBERT, RETALIATION IN INTERNATIONAL LAW, 60-103 (1948) (Wherein she discusses a comprehensive history of public reprisals).

⁷⁵ Waldock, *supra* note 32, at 458.

⁷⁶ *Id.* at 459.

⁷⁷ *Id.* See also COLBERT, *supra* note 74, at 60-61.

attempted to obtain redress from the wrongdoing foreign State first.⁷⁸ The seminal definition of the customary law of forcible reprisals, and the requirements for its legitimacy, was set forth in the *Naulilaa* case.⁷⁹

In the *Naulilaa* incident, three German officials were killed in the Portuguese territory of Southwest Africa, and two others were interred.⁸⁰ Germany thereafter invaded Portuguese territory and destroyed several forts and posts, which led to a native uprising and substantial cost to Portugal.⁸¹ Portugal and Germany agreed to submit Portugal's claim to an arbitral tribunal.⁸² The tribunal rejected Germany's pleading of legitimate reprisal and set forth the following definition of reprisal:

Reprisals are an act of self-help of the injured state, in retaliation for an unredressed act of the offending state contrary to international law. They have for object to suspend momentarily, in the relations between the two states, the observance of such or such a rule of international law. They are limited by the rules of humanity and good faith applicable in the relations of state to state. They will be illegal unless a previous violation of international law has furnished the justification. They tend to pose on the offending state reparation for the offence or the return to legality and avoidance of new offences.⁸³

⁷⁸ Waldock, *supra* note 32, at 459.

⁷⁹ *Id.* at 460. (citing 2 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 1012 (1928)). See also THOMAS, *supra* note 34, at 86. "Possibly the clearest definition and declaration of the legal requirements of reprisals was set forth by the German-Portuguese Arbitration Tribunal in the *Naulilaa Case* in 1928." *Id.* James Leslie Brierly considered the *Naulilaa* case as being the most authoritative statement of the history of the customary law of reprisals. BRIERLY, *supra* note 70, at 400.

⁸⁰ HERBERT W. BRIGGS, THE LAW OF NATIONS 951 (1952). See also Schwarzenberger, LAW AS APPLIED BY INTERNATIONAL COURTS, 261-262 (1949); L.C. GREEN, INTERNATIONAL LAW THROUGH THE CASES, 685-689 (1970).

⁸¹ *Id.*

⁸² Waldock, *supra* note 32, at 460.

⁸³ BRIGGS, *supra* note 80, at 951; GREEN, *supra* note 80, at 686.

Germany argued that the attack and death of the three Germans, the detention of the two Germans, and the subsequent expulsion of the German Vice-Consul provided sufficient basis as international law violations to validate acts in reprisal.⁸⁴ Germany also argued that its communications notifying all German posts of the incidents, also addressed to the Governor of the Portuguese Territory, was tantamount to a request for explanations from Portugal and a demand for the release of the German prisoners.⁸⁵ The Tribunal rejected Germany's claims and set forth the requirements for valid reprisals as stated above and applied to the facts of the case. First, there must be a previous violation of international law as a condition precedent to the legitimate use of reprisals; second, there must be an unsuccessful demand for redress before justifying the use of force; third, any reprisals taken must be proportionate to the injuries suffered.⁸⁶

The Tribunal found that the initial clash between Portugal and Germany was not an international law violation but the result of a mistake or accident.⁸⁷ The Tribunal then stated that even if it had been an international law violation, the reprisal was illegitimate because there was no denial of a request for redress by Portugal and the reprisal response was disproportionate to the injury received by Germany.⁸⁸ Thus reprisals, to be legitimate prior to the Charter, required an underlying State violation of international law with subsequent

⁸⁴ BRIGGS, *supra* note 80, at 952.

⁸⁵ *Id.*

⁸⁶ BRIGGS, *supra* note 80, at 952; GREEN, *supra* note 80, at 687.

⁸⁷ BRIGGS, *supra* note 80, at 952.

⁸⁸ BRIGGS, *supra* note 80, at 953.

necessity for armed force due to a lack of redress by the responsible party. In addition, any reprisal taken had to be proportional to the underlying international law violation.⁸⁹

The aforementioned requirements look very similar to those required under the doctrine of self-defense discussed above. Reprisals and self-defense are related methods of forcible self-help; each has a common set of preconditions for valid application:⁹⁰

The target State must be guilty of a prior international delinquency against the claimant State . . . An attempt by the claimant State to obtain redress or protection by other means must be known to have been made, or to be inappropriate or impossible in the circumstances . . . The claimant's use of force must be limited to the necessities of the case and proportionate to the wrong done by the target State.⁹¹

Although these two concepts have similar elements, they are distinct and different in application. Self-defense is allowed under international law to protect the security of the state, its citizens, and its essential rights. These rights are protected in the Charter via the inviolability of the rights of territorial integrity and political independence upon which state security depends.⁹² In contrast, reprisals are punitive in character. Reprisals seek to obtain some form of reparation for harm done, or alternatively, to compel another offending state to abide by international law in the future. Thus, reprisals seek their legitimacy after the event, after an international law violation has already occurred, and therefore reprisals cannot be characterized as a means of protection or self-defense. Judge Waldock also distinguished

⁸⁹ THOMAS, *supra* note 34, at 86.

⁹⁰ O'Brien, *supra* note 27, at 422 (citing, Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 3 (1972)) (The author cites to the work of Mr. Bowett as the "most comprehensive and authoritative treatment of the relation between reprisals and self-defense in international law." *Id.*).

⁹¹ O'Brien, *supra* note 27, at 422-423.

⁹² See *supra* note 23 and accompanying text.

reprisals from self-defense. He stated that reprisal was only allowed in response to an international delinquency, while self-defense could be for a threat of injury if the injury was impossible to avert in time. Thus, self-defense is preventive, or immediately responsive, and reprisal is in response to prior injury.⁹³

The weaknesses in using self-defense to legitimize attacks against terrorist organizations and facilities were discussed above. Peacetime reprisal fails to provide a legitimate legal basis to use force against terrorist organizations and facilities as well. The passage of the League of Nations and Kellogg-Briand Pact⁹⁴ diminished the customary law of reprisals. However, jurists and scholars initially argued that the Pact and League's restrictions on "resort to war" allowed for other uses of armed force short of war to include reprisals.⁹⁵ This issue was submitted to a committee of jurists by the League to determine, "whether measures of coercion not intended to constitute acts of war were consistent with Articles 12-15 of the Covenant, when taken without prior recourse to arbitration, judicial settlement or conciliation."⁹⁶ "The jurists replied simply that such coercive measures might or might not be consistent with the Covenant according to the circumstances of the case."⁹⁷ However, the majority of jurists considered armed reprisals contrary to the Covenant, whether or not they

⁹³ Waldock, *supra* note 32, at 464.

⁹⁴ See *supra* note 43 and accompanying text for a discussion of the League of Nations and Kellogg-Briand Pact.

⁹⁵ *Id.* at 475.

⁹⁶ PHILLIP JESSUP, A MODERN LAW OF NATIONS 173-74 (1958). See also COLBERT, *supra* note 74, at 84). (The trigger for this request was the Corfu incident in (date) which Italy bombarded and occupied Corfu in an act of reprisal for the murder of an Italian General on Greek territory. Although the matter was settled outside the League, smaller States demanded the answer to the posed question.).

⁹⁷ JESSUP, *supra* note 96, at 173-74 (citing LEAGUE OF NATIONS, OFFICIAL JOURNAL 1924, 523-527).

amounted to "resort to war."⁹⁸ These jurists reasoned that although armed reprisals did not amount to war, utilization of reprisals was inconsistent with the good faith obligation to use pacific settlement means to resolve disputes.⁹⁹

The United Nations Charter denigrated the use of armed reprisals further. As discussed above, the provisions of Article 2 require States to settle international disputes by peaceful means and refrain from the use of force, or threat of the use of force, in international relations. The Charter left open some room for argument that the provisions of Article 2 did not abolish reprisals by the insertion of the words, "force against the territorial integrity or political independence of any state."¹⁰⁰ However, the argument that an armed intervention not calculated to impair the territorial integrity or political independence of a State being acceptable under the Charter was considered and strictly limited by the Corfu Channel Case.¹⁰¹

⁹⁸ Waldock, *supra* note 32, at 476 (citing E. G. RAY, COMMENTAIRE DU PACTE DE LA SOCIÉTÉ DES NATIONS 358-359 (1930); FAUCHILLE, TRAITÉ DE DROIT INTERNATIONAL PUBLIC, LIVRE I, PART 3, at 696). *See also* COLBERT, *supra* note 74, at 84-87 (for a discussion of the scholarly debate).

⁹⁹ Waldock, *supra* note 32, at 476.

¹⁰⁰ *Id.* at 493.

The words 'territorial integrity or political independence' were inserted at San Francisco at the instance of the smaller Powers who had asked in vain for an affirmative guarantee of protection against aggression. *Id.* (citing GOODRICH AND HAMBRO, CHARTER OF THE UNITED NATIONS 104-105 (1949)). *See also supra* note 130 for further explanation of this point. "The insertion of these words left open the possibility of arguing - as did the United Kingdom in the Corfu Channel Case - that an armed intervention which was not calculated to impair territorial integrity or political independence is not a breach of Article 2(4).

Id. (citing 3 I.C.J. REPORTS, PLEADINGS 296 (1950).

¹⁰¹ Waldock, *supra* note 32, at 493.

The Corfu Channel case involved a dispute between British warships, on a freedom of navigation exercise, and Albania.¹⁰² Albanian shore batteries fired on the British warships in May of 1946 as they were making passage through the North Corfu Strait.¹⁰³ "Diplomatic correspondence ensued in which Albania denied that foreign warships had a right of innocent passage through her territorial waters in a strait; the United Kingdom, on the other hand, asserted that they possessed such a right and that any further attack would be replied to with force."¹⁰⁴ In October of 1946, two British warships struck mines laid by Albania within the channel.¹⁰⁵ The United Kingdom did not immediately appeal to the U.N. Security Council but instead swept the channel of mines.¹⁰⁶ Later, the matter was submitted to the Security Council, which recommended the matter be sent before the International Court of Justice for resolution.¹⁰⁷ The British asserted the rights of innocent passage and self-help in defense of its actions before the Court.¹⁰⁸ Additionally, it argued that its actions did not violate the political independence of Albania, thereby keeping Britain's action out of the parameters of Article 2(4) of the Charter.¹⁰⁹ The Court upheld the actions of the British warships in exercising their right of innocent passage, but condemned the actions in clearing the mines in the channel.¹¹⁰ "Accordingly, although the Court went far when it allowed a demonstration of

¹⁰² BRIGGS *supra* note 80, at 291.

¹⁰³ *Id.*

¹⁰⁴ Waldock, *supra* note 32, at 499.

¹⁰⁵ THOMAS, *supra* note 34, at 133.

¹⁰⁶ Waldock, *supra* note 32, at 499.

¹⁰⁷ *Id.*

¹⁰⁸ THOMAS, *supra* note 34, at 134-35.

¹⁰⁹ See *supra* note 100 for a discussion of the British pleadings.

force to test and coerce Albania, it ultimately drew a sharp distinction between (1) a forcible affirmation of legal rights, which is legitimate, and (2) forcible self-help to obtain redress for rights already violated, which is illegal."¹¹¹ Thus, the Court affirmatively denied the argument that reprisal for past wrongs would not violate the provisions of the Charter, if the actions in reprisal were not intended to violate the territorial integrity or political independence of the State wherein action was taken.

It is clear that peacetime reprisals are considered illegitimate acts under the U.N. Charter.¹¹² The United Nations Security Council has frequently condemned reprisals as being illegal.¹¹³

The Security Council expressed its view of the status of reprisals in 1964 when it censured Great Britain for carrying out a reprisal against the Yemeni town of Harib in retaliation for alleged Yemeni support of the anti-colonial struggle in Aden. By a vote of 9-0, with two abstentions, the Security Council determined that it 'condemns reprisals as incompatible with the purposes and principles of the United Nations.'¹¹⁴

¹¹⁰ BRIGGS *supra* note 80, at 297-298.

¹¹¹ Waldock, *supra* note 32, at 502.

¹¹² Bowett, O'Brien, Intoccia, and Rowles all acknowledge that modern scholars reject the legitimacy of reprisals under international law after the Charter. Bowett, *supra* note 90, at 1, (1972); O'Brien, *supra* note 27, at 421; Intoccia, *supra* note 50, at 199 (1987); James Rowles, *Military Responses to Terrorism: Substantive and Procedural Constraints in International Law*, 81 PROC. AM. SOC'Y INT'L L. 309 (1987). However, this has not prevented scholars from arguing that the doctrine of peacetime reprisals should be resurrected to apply to modern problems. O'Brien's article is one such example.

¹¹³ O'Brien, *supra* note 27, 2-15. (Mister O'Brien traces the history of Security Council decisions regarding reprisal actions by Israel and other nations from 1953 to the present).

¹¹⁴ Lohr, *supra* note 2, at 32. (citing Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM J. INT'L L. 415, 429 and n. 37 (1969)).

The General Assembly has also condemned reprisals under the Charter, "States have a duty to refrain from acts of reprisal."¹¹⁵ Additionally, at least one scholar has commented that peacetime reprisal requires a determination by the International Court of Justice that a violation of international law has occurred¹¹⁶ This is because a condition precedent to a state embarking on a retaliation by reprisal is a violation of international law, and many nations have accepted compulsory jurisdiction by the Court. This compulsory jurisdiction extends:

in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation.¹¹⁷

There is a valid recognition that international law never meant to protect terrorist organizations through the provisions of the U.N. Charter. However, this does not translate into a need to ignore legal precedent and force the customary law of reprisals into a modern day, legally valid practice under the Charter based on necessity grounds. The principal elements of the law of reprisals also do not fit clearly into the modern terrorist reality. Certainly international terrorist actions are violations of international law. Indiscriminate targeting and killing of civilians is proscribed under many theories of international law.¹¹⁸ Thus, the necessity for an international wrong can be satisfied as the condition precedent to invoking the law of reprisals. However, the requirement of an opportunity to redress the

¹¹⁵ G.A. Res. 2625, *reprinted in* 13 UNITED NATIONS RESOLUTIONS, SERIES I: GENERAL ASSEMBLY 338 (Dusan Djonovich ed., 1976).

¹¹⁶ COLBERT, *supra* note 74, at 205-06.

¹¹⁷ *Id.* at 205.

¹¹⁸ See The Terrorism Conventions, discussed at *supra* note 147 below, the Doctrine of State Responsibility, discussed at *supra* notes 275 to 301 below, and the Kadic decision, discussed at *infra* notes 291 to 297 below.

international law violation is virtually impossible to meet in an era of non-State sponsored terrorism. Who, exactly, will the redress come from, particularly in a situation such as the one facing the United States in 1998? The terrorist organization was located in two separate states who claimed to have no knowledge of the activities in the terrorist camps. Is the request for redress given to the two sovereigns or would the State offended be required to attempt redress from the terrorist organization itself? The clear condemnation of reprisal actions post-Charter, coupled with the inability to apply the necessary elements of reprisal to terrorist organizations in the modern era makes this basis for justifying force unsupportable

3. *Acts not directed at the territorial integrity or political independence of another State.*

Article 2(4) prohibits the use or threat of force against the "territorial integrity" or "political independence" of other nation states.¹¹⁹ This language within Article 2(4) has given rise to the argument that the use of force in a limited amount and for a limited duration within another State's territory may be lawful in some circumstances despite the overall purpose of Article 2(4).¹²⁰ This argument is advanced in situations involving protection of nationals abroad under the theory that the minor use of force is not directed at endangering the system of government of the other State, but is used solely to protect the nationals of the intervening State. Within the group that does advocate minor coercive measures being proper under

¹¹⁹ See *supra* note 23 and accompanying text.

¹²⁰ See STONE, *supra* note 43, at 95.

Article 2(4), there exists disagreement on the amount of force allowed in intervention to refrain from violating territorial integrity.¹²¹ Some advocates of this proposition claim that any use of armed force within the territory of the other State thereby violates its territorial integrity.¹²² This would thereby leave threats of force and acts of intercession¹²³ vice intervention as appropriate options under Article 2(4). However, the majority of proponents of this theory believe that limited use of force is allowed if the other State's government "lacks some degree of control over its territory."¹²⁴ "One publicist observed that 'one can construct an interpretation of 2(4) that justifies the use of armed force against groups that are operating in a vacuum of governmental authority.'¹²⁵ "Statehood requires a national legal order, which ceases to be valid as soon as it loses effectiveness."¹²⁶

Julius Stone, the early proponent of this argument, rested his proposal on the requirement to read the textual provisions of the Charter in concert with one another.¹²⁷ Therefore, Article 2(4) must be read in conjunction with Article 2(3), and thereby establishes that only the resort to force against the territorial integrity or political independence of another State is prohibited.

¹²¹ James R. Edmunds, Note, *Nonconsensual U.S. Military Action Against the Colombian Drug Lords Under the U.N. Charter*, 68 WASH. U. L. Q. 129, 139 (1990).

¹²² *Id.* (citing M. SORENSON, *MANUAL OF PUBLIC INTERNATIONAL LAW* 253, 254 (1968)).

¹²³

¹²⁴ Edmunds, *supra* note 121, at 139.

¹²⁵ *Id.* at n. 59 (citing Gordon, *Article 2(4) in Historical Context*, 10 YALE J. INT'L L. 271, 277 (1985)).

¹²⁶ Edmunds, *supra* note 121, at n. 59, (Citing H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 383 (1966)).

¹²⁷ STONE, *supra* note 43, at 94-101.

... the extreme view asserts that resort to force by a Member is unlawful, regardless of any wrongs or dangers which provoked it . . . The first observation called for by this extreme view is that it does not spring self-evidently from the relevant provisions of the Charter. Article 2(4) does not forbid 'the threat or use of force' *simpliciter*; it forbids it only when directed 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.' By the preceding paragraph 3 of Article 2, Members also undertook to 'settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.' But the suggestion that this positive injunction of Article 2(3) to settle disputes by peaceful means carries with it so revolutionary a negative implication as the absolute prohibition of the use of force for the vindication of rights, even when no other means exists, is also dubious. For, in the first place, if Article 2(3) really imported such a blanket prohibition of the use of force, why should the draftsmen have felt it necessary to follow it immediately with a very much more limited prohibition, in Article 2(4), of the use of force against the 'territorial integrity and political independence of any state, etc.'?¹²⁸

Stone goes on to argue that failure to accord the interpretation of Article 2(4) as he has proposed will lead to absurd results:

We do not deny that, *as a matter of exegesis*, the extreme view of the prohibition of force in Article 2(4) is possible. We *do* question whether, even in terms of exegesis, it is the *only possible*, or even more likely view, and whether in light of the absurdities and injustice to which it would lead, it must not be regarded as an incorrect one . . . It has been submitted, therefore, that the extreme view of Article 2(4) prohibiting resort to force by States for the vindication of their rights, save in reaction to armed attack or pursuant to collective decisions, is neither self-evident nor even beyond reasonable doubt in the whole context of the Charter. These doubts on grounds of exegesis are (as we have shown) powerfully reinforced by the persistent illegality and injustice which the extreme view would require States to tolerate indefinitely.¹²⁹

While Stone and the other scholars identify critical points, that the Charter must be read in context with all its provisions and that States which fail to exercise State responsibilities

¹²⁸ *Id.* at 95 (citations omitted).

¹²⁹ *Id.* at 97-99.

can lose the ability to protest interventionary actions, the focus of their arguments are misplaced. Stone's argument is unsound and has drawn counter views from Professor Ian Brownlie.¹³⁰ A use of armed force by one State within the territorial boundaries of another State is, per se, a violation of its territorial integrity and qualifies definitionally as an act of aggression.¹³¹ It is thereby proscribed under the U.N. Charter, unless an exception to the use of force exists. This interpretation of actions which constitute a violation of another state's territorial integrity is verified by the International Court of Justice, and the United Nations Security Council.

In the Corfu Channel case¹³² the International Court of Justice unanimously rejected Great Britain's claim that its temporary encroachment to clear mines from Albanian waters did not violate Albania's territorial integrity.¹³³ Additionally, the Court set forth general principles concerning sovereignty and territorial integrity of nations in its opinion in the

¹³⁰ See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 265-268 (1963). Professor Brownlie asserts that the provision was inserted into Article 2(4) at the insistence of smaller states because of their fear of intervention by larger states. He states, "[t]he conclusion warranted by the *travaux préparatoires* is that the phrase under discussion was not intended to be restrictive but, on the contrary, to give more specific guarantees to small states and that it cannot be interpreted as having a qualifying effect." *Id.* at 267, (citations omitted). Therefore, he argues that the inclusion of the terms territorial integrity and political independence were not contemplated by the drafters to limit the Article and provide qualifying exceptions, but rather to provide additional clarification and limitations on the actions of states.

¹³¹ This is particularly true since the passage of the 1974 General Assembly Resolution defining aggression. Although this Resolution sets forth the definition of aggression as a triggering mechanism for Security Council action under Article 39, it also provides significant guidance to the international community detailing the common acts which constitute aggression. See *supra* notes 281 to 288 and accompanying text for further explanation of the Resolution.

¹³² See *supra* note 102 and accompanying text.

¹³³ "Between independent States, respect for territorial integrity is an essential foundation of international relations [T]o ensure respect for international law . . . the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty." Levitin, *supra* note 52, at n. 27 (citing Corfu Channel (U.K. v. Alb.) 1949 I.C.J. 4, 35.

Nicaragua case.¹³⁴ In laying out its opinion, the Court provided guidance to the international legal community regarding the duty of states to respect the territorial integrity of other nations:

[T]he right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State . . .¹³⁵

Thus, the International Court of Justice has made it clear that armed incursions into the sovereign territory of another nation violates that nation's territorial integrity, even if the incursion is temporary in nature.

The United Nations Security Council has likewise condemned temporary, armed incursions into the sovereign territory of another nation. "The Security Council has condemned and declared illegal the crossings of South African armed forces into Angola and by Israeli forces into Lebanon, even though the South African and Israeli incursions were temporary."¹³⁶ Therefore, any armed incursion into the sovereign territory of another state violates its territorial integrity and is therefore unlawful under the United Nations Charter unless an exception to that use of force exists.

¹³⁴ Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. Reports 14 (June 27) (merits) [hereinafter Nicaragua case]. (Nicaragua protested U.S. armed interventions and actions which it asserted violated Nicaraguan waters and air space.).

¹³⁵ *Id.* at 180-181.

¹³⁶ Levitin, *Supra* note 52, at n. 27, (citing S.C. Res. 545, 38 U.N. SCOR 20, U.N. Doc. S/RES/545 (1983) (South Africa in Angola); S.C. Res. 332, 28 U.N. SCOR 8-9, U.N. Doc. S/RES/332 (1973) (Israeli invasion of Lebanon)). "(See also, e.g., S.C. Res. 455, 34 U.N. SCOR Resolutions and Decisions 22, U.N. Doc. S/Res/455 (1979) (declaring temporary Rhodesian incursion into Zambia a violation of Zambia's territorial integrity)." *Id.*

Thus, while Mister Stone correctly identifies the absurdity of disallowing armed intervention to protect a State's vital interests, his focus is incorrect. A direct intervention through armed force is directed within the territorial integrity of another State, but it is otherwise allowed under international law as an exception to the general prohibition on the use of force. Therefore, force is allowed, not because it isn't directed against the territorial integrity of the other nation, but because it is allowed under other principles of international law. Force is allowed under the parameters of Article 51 of the Charter. Alternatively, force is allowed as a valid extension to the parameters of Article 51 has occurred through the practice of nations and has become customary international law.

4. Utilization of the United Nations Process: Security Council Actions

The United Nations Charter envisioned, in Articles 43 through 49, that the Security Council and Military Staff Committee would be the arbitrator and deciding body on all matters of intervention. Unfortunately, this body has not realized the ability to fulfill its mission as was contemplated when the Charter was passed.

[T]he current state of [world] affairs is characterized by a collective security system that is not effective or likely to be so, by a preference for peaceful change which unfortunately is not translated into techniques by which such change may be achieved, and by a set of economic and social conditions that lead to constant change and friction inflicting more or less serious deprivations, though less than the use of force, upon state interests. As a result of these factors . . . a state may suffer considerable injury that the existing system remains completely unable to remedy through collective procedures. If the individual state is also forbidden to resort to minor coercion

in self-help, the accumulation of irritations and pressures may create conditions favorable to the employment of very intense forms of coercion.¹³⁷

“Although written in 1963, this analysis is equally relevant today. Despite the United Nations Charter, the world community is largely without an effective organization for the collective enforcement of important international policies.”¹³⁸ These observations have been joined by many scholars and are evident in the contemporary practice of the United Nations today. One scholar has stated, “only in the most exceptional cases will the United Nations be capable of functioning as an international enforcer; in the vast majority of cases the conflicting interests of diverse public order systems will block any action.”¹³⁹ Another has commented, “the failure to implement Article 43 of the Charter and those which follow it . . . between the permanent members of the Security Council have prevented the collective security system from working properly.”¹⁴⁰ Since this comment was made in 1985, some improvements to the response by United Nations forces has occurred, but, its ability to respond to international terrorism is suspect at best. U.N. intervention has certainly taken a step in the right direction with U.N. backed operations in the Persian Gulf, Haiti, Somalia, etc. But, responding to long-term humanitarian problems with a durational presence is

¹³⁷ Lohr, *supra* note 2, at 35. (citing W. T. BURKE, *THE LEGAL REGULATION OF MINOR INTERNATIONAL COERCION: A FRAMEWORK OF INQUIRY IN ESSAYS ON INTERVENTION* 87, 109 (R. Stanger ed., 1964)).

¹³⁸ Lohr, *supra* note 2, at 35.

¹³⁹ M. REISMAN, *NULLITY AND REVISION. THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS* 850 (1971).

¹⁴⁰ NATALINO RONZITTI, *RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY* 2, (1985). As a premise for his book, Natalino Ronzitti states that the necessity and value of inquiring into the limits of the use of force in international relations derives from the absence of any implementation of the United Nations security system. He explains that this lack of a U.N. enforcement mechanism is the reason States have resurrected pre-Charter practices such as the right of intervention for protecting nationals abroad while concurrently, verbally abiding by the principles set forth in Article 2(4) of the Charter. This evolves into an argument of necessity for a State to fulfill its obligations as a government toward its citizens in the face of an ideal which suffers in practice. *Id.* at xi.

wholly different than targeting terrorist activities, training facilities and operations. The United Nations mechanism does not have the intelligence resources, manpower, or response time necessary to combat modern-day terrorist organizations. Additionally, the individual members of the Security Council each have differing political agendas, rationales and allies. "The veto power remains one of the most significant obstacles to the effective workings of the Security Council."¹⁴¹ One author, reinforcing her point with persuasive authority, states that the five permanent members have precluded the Security Council from discharging its duties under the Charter due to each State's particular interests.¹⁴² She provides examples where the Security Council has been deadlocked or impotent in its ability to respond to major world crises since 1945.¹⁴³ Therefore, the concept of United Nations collective enforcement, while great in theory, suffers in practice in all but the most egregious circumstances such as those encountered in Haiti and Somalia. As the Rapporteur for the 1968 Buenos Aires Conference of the International Law Association succinctly stated, "human rights without effective implementation are shadows without substance."¹⁴⁴ This comment is particularly significant as the Rapporteur was charged with investigating human rights abuses and

¹⁴¹ Judy A. Gallant, *Humanitarian Intervention and Security Council Resolution 688: A Reappraisal in Light of a Changing World Order*, 7 AM. U. J. INT'L L. & POL'Y. 881, 899 (1992) (citing U.N. Press Release GA/8247 (1991); U.N. Press Release GA/8249 (1991); U.N. Press Release GA/8251 (1991); G.A. Provisional Verbatim Record A/46/PV.41 (1991); G.A. Provisional Verbatim Record A/46/PV.42 (1991)).

¹⁴² *Id.* (citing Chinese Premier L. Peng's address to the U.N. Security Council (Jan. 31, 1992), in Fed. News Serv., Jan. 31, 1992, at VP-5-1, 3-4).

¹⁴³ Gallant, *supra* note 141, at 900. She provides, as examples, three General Assembly Resolutions aimed at limiting the veto power of the Security Council to prevent deadlocks: G.A. Res. 40, U.N. Doc. A/64/Add.1, at 64 (1946); G.A. Res. 117, U.N. Doc. A/519, at 23 (1947); G.A. Res. 267, U.N. Doc. A/900, at 7-8 (1948). See also Thomas M. Franck, *United Nations Based Prospects for a New Global Order*, 22 N.Y.U. J. INT'L L. & POL. 601, 614 (1990); HANS KEESEN, *THE LAW OF THE UNITED NATIONS* 277-279 (1951); Crispin Tickell, *The Role of the Security Council in World Affairs*, 18 GA. J. INT'L & COMP. L. 307, 311 (1988).

¹⁴⁴ Richard B. Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L.J. 205, 206 (1969). (citing INT'L. L. ASS'N., *Report of the Rapporteur of the Committee on Human Rights to the Fifty-Third Conference*, Buenos Aires, 24 (1968)).

reporting his findings back to the United Nations. His finding of a plethora of abuses without U.N. response action led to his comments concerning the relative ineffectiveness of requirements to protect fundamental human rights. This comment simply echoes the observations of those scholars listed above and mixes with the political realities of the modern world. As a further summarization of this point, one noted scholar commented as follows:

As Dean Huston has demonstrated in an exhaustive article on the United Nations Conference on International Organization, the framers of the United Nations devoted ample time in 1945 to debating the insertion into the Charter of numerous provisions concerning human rights, but left to a later day the methods by which those same Charter provisions might be made effective.¹⁴⁵ The result has been that whatever hopes the framers of the Charter had for progress in this area, at least on the procedural side, have not been realized. Doctor Korey, in a recent article, has observed that 'if the United Nations has been extraordinarily successful during the past twenty years in formulating standards of conduct, it has been sadly negligent in creating institutions and procedures for translating these standards into actual observance.'¹⁴⁶

The United Nations is incapable of responding to the fast-paced, global threat of international terrorism. The Charter provisions, while improved in recent years in areas of significant humanitarian deprivations, have been ineffectual in stopping international terrorism. Political realities add context to the phrase one man's terrorist is another man's freedom fighter. Lack of intelligence collection sources, force structures, and centralized command relationships all detract from the ability to respond to immediate threats.

¹⁴⁵ Lillich, *supra* note 144, at 207 (citing Huston, *Human Rights Enforcement Issues of the United Nations Conference on International Organization*, 53 IOWA L. REV. 272 (1967)).

¹⁴⁶ Lillich, *supra* note 144, at 207. (citing Korey, *A Global Ombudsman*, SATURDAY REVIEW 20 (Aug. 12, 1967)).

III. Legal Means and Methods to Combat Terrorism not Involving Force: Terrorism Treaties and Prosecution

A. *International Terrorism Agreements -- Why They Haven't Worked*

There presently exist eleven multilateral conventions that govern State responsibilities for combating terrorism.¹⁴⁷ In addition to these eleven multilateral treaties, there exist numerous bilateral treaties which become relevant to the enforcement of some of the multilateral agreements. An example would be a bilateral treaty regarding extradition.

¹⁴⁷ The Convention on Offenses and Certain Other Acts Committed On Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219, better known as the Tokyo Convention, concerned the safety of aviation and acts affecting flight safety. Gave numerous powers to the aircraft commander and charged contracting states to take custody of offenders and release aircraft; The Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, better known as the Hague Convention, concerned aircraft hijackings. Made criminal certain acts of individuals and imposed on parties an affirmative obligation to criminalize the conduct and prosecute or extradite the offenders; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, better known as the Montreal Convention, applied sanctions to acts of aviation sabotage such as bombing. Required similar provisions to the Hague Convention, including legislation, extradition and prosecution centered around bombing; Convention for The Prevention and Punishment of Crimes Against Internationally Protected Persons, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167, protects senior government officials and diplomats. Provides definitions of internationally protected persons, requires parties to criminalize certain acts, requires extradition or submission for prosecution.; Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, T.I.A.S. 11080, also known as the Nuclear Materials Convention, proscribes unlawful taking and use of nuclear material. Criminalizes certain acts and requires extradition or submission for prosecution; International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. 11081, also known as the Hostage Convention, criminalizes conduct of taking hostages for political purposes and requires extradition or submission for prosecution; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, U.K.T.S. 20, ICAO Doc. 9518 (1991), extends and supplements the Montreal Convention to encompass acts at airports; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 672, applies terrorist prohibitions to ships. Establishes an analogous legal regime to the aviation agreements that covers ships; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 27 I.L.M. 685, applies terrorist regime to fixed offshore platforms, also contains similar extradite or submit for prosecution requirements; Convention on the Marking of Plastic Explosives for the Purpose of Identification, agreed to in March of 1991, 30 I.L.M. 726, provides for chemical marking to facilitate detection of plastic explosives to combat aircraft and other bombing; International Convention for the Suppression of Terrorist Bombing, Nov. 25, 1997, *found at* <http://www.un.org/law/terrorism.htm>, expands the legal regime and fosters greater international cooperation

Moreover, United Nations Security Council Resolutions and other treaties have had some impact on interpretation and enforcement of multilateral terrorism agreements.¹⁴⁸ The principal methodology surrounding each of these agreements is the requirement by states to either extradite or submit for prosecution those actors that violate the provisions of the treaties. However, undermining the ability to enforce these treaties, and thereby making them relatively toothless outside the domestic jurisdiction of an offense, are three interrelated systemic problems, each of which will be discussed below. First, the problem of defining exactly what constitutes terrorist acts and terrorism in general. Second, the inherent tension between Third World countries and developed countries, who at one time were colonial powers, regarding the ability to fight colonial domination and racist regimes. Finally, compliance problems in achieving extradition or prosecution for actors involved in "terrorist" or "political" activities.

1. *"International Terrorism: the Definitional Quagmire."*¹⁴⁹

An appropriate synopsis to one of the principal problem areas in international terrorism agreements is as described in John Murphy's book. Mister Murphy provides one of the best

for investigation, prosecution, and extradition of persons engaged in terrorist bombings. A synopsis of all these agreements can be found at <<http://www.state.gov/www/global/terrorism/>>.

¹⁴⁸ See e.g., the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

¹⁴⁹ JOHN F. MURPHY, STATE SUPPORT OF INTERNATIONAL TERRORISM: LEGAL, POLITICAL, AND ECONOMIC DIMENSIONS 3 (1989).

reviews of International Terrorism Agreements and Conventions in one source. His concern over the definitional quagmire of defining terrorism is set forth succinctly and concisely.

Walter Laquer, a leading commentator on terrorism, recently pointed out that 109 different definitions of the term were advanced between 1936 in 1981, and more have appeared since, including a half-dozen provided by the U.S. government. None of these definitions has been adopted by the world community. Efforts in the academic world to reach agreement on a definition have been equally unavailing. In practice the terms terrorism and terrorists have been used by politicians as labels to pin on their enemies. The cliché 'one man's terrorist is another man's freedom fighter' is a notorious reflection of this game of semantics.¹⁵⁰

The problem in defining "international terrorism," and "international terrorist," will quite naturally cause interpretation and execution problems when a State attempts to use an international terrorism agreement or convention. If no common definition of terrorism or terrorist exists, the ability of States to successfully use international agreements becomes manifestly more difficult.

Professor W.T. Mellison has stated: Terror and Terrorism are not words which refer to a well defined and clearly identified set of factual events. Neither do the words have any widely accepted meaning in legal doctrine. Terror and Terrorism, consequently, do not refer to a unitary concept in either law or fact.¹⁵¹

Mister Murphy adds significant weight to his definitional concern in another book where he quotes the late Richard Baxter, United States Judge on the International Court of Justice:

The late Richard Baxter, Professor of International Law at Harvard University and United States Judge on the International Court of Justice, was particularly

¹⁵⁰ *Id.* (citing Laquer, *Reflections on Terrorism*, 64 FOREIGN AFF. 86, 88 (1986)).

¹⁵¹ Lohr, *supra* note 2, at 4-5. (citing Mellison & Mellison, *The Concept of Public Purpose Terror in International Law: Doctrines and Sanctions to Reduce the Destruction of Human and Material Values*, 18 HOW. L.J. 12 (1974)).

dubious regarding the desirability and necessity of defining the term. In his view, 'We have cause to regret that a legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose.¹⁵²

It is critical to understand that the inability of States to agree on a precise definition, due to political and philosophical differences, quite naturally leads to an inability to enforce any agreement or covenant, be it criminal or otherwise. Developed superpowers, such as the United States, quite logically will have a totally different theory and definition for the term terrorism than a developing country concerned with colonial domination and racist regimes. The bottom line is that international agreements, while good in theory, become paper tigers in practice due to the differing interpretations of these terms and fears by nation states that adopting the proposed definition will degrade their ability to fend off colonial domination. "The lack of any international agreement on the definition of terrorism makes it difficult, if not impossible, to obtain consistent, and therefore, deterrent judgments in extradition proceedings."¹⁵³

This inability to precisely define terrorism or terrorist acts revolves around the inherent tension between Third World nations and developed countries. A large disparity of opinion regarding the definition of terrorism exists in the world, as well as the academic community, depending on whether terrorism is viewed as an act of criminal violence or as a politically motivated function. Thus, the phrase cited earlier, one man's terrorist is another man's

¹⁵² JOHN F. MURPHY, PUNISHING INTERNATIONAL TERRORISTS 3 (1985), (citing R. Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 AKRON L. REV. 380 (1974)). See also Oscar Schachter, *The Extra-territorial Use of Force Against Terrorist Bases*, 11 Hous. J. INT'L L. 309 (1989). "[N]o single inclusive definition of international terrorism has been accepted by the United Nations or in a generally accepted multi-lateral treaty." *Id.*

¹⁵³ Liam G. B. Murphy, *A Proposal on International Legal Responses to Terrorism*, 2 TOURO J. TRANSNAT'L L. 67, 78-79 (1991).

freedom fighter, takes on significant importance in the world community when attempting to fashion a definition which proscribes terrorist activities. This, in short, has been the plague and downfall of successful implementation of international terrorism agreements, as will be discussed next.

2. Evolution of Terrorism Agreements:

Terrorism, as a legal concern, is a relatively new concept. "The word terror was first used in connection with the Jacobin reign of terror following the French Revolution."¹⁵⁴ Governments have attempted to confine the definition of terrorism to government action only. They thereby have defined terrorism solely in terms of "state terrorism." This approach, however, has relatively few supporters. Modern terrorism primarily deals with actions by private individuals or groups.¹⁵⁵ This is mainly due to the inability to trace sponsorship of terrorist groups to individual State sponsorship. This difficulty has led to a shift in definition towards punishing individual acts of States sponsoring terrorism groups. Historically, we must trace the evolution of terrorism agreements to reach this conclusion.

As applied to actions by individuals, the term terrorism was apparently used for the first time in an international penal instrument at the Third (Brussels) International Conference for the Unification of Penal Law held on June 26-30,

¹⁵⁴ *Id.* at 4. (citing R. FRIEDLANDER, TERROR VIOLENCE 7-8 (1983)).

¹⁵⁵ See Kevin J. Greene, *Terrorism as Impermissible Political Violence: An International Law Framework*, 16 VT. L. REV. 461, 464 (1992), (Sets forth the proposition that modern terrorism arose as a tactic in modern wars of national liberation). See also G. SMITH, COMBATting TERRORISM 4 (1980).

1930, in response to an increase in terrorist activity following World War I.¹⁵⁶ . . . This interest in terrorism intensified with the assassination at Marseilles on October 9, 1934, of King Alexander of Yugoslavia and Louis Barthou, Foreign Minister of the French Republic, and led to the League of Nations drafting the convention for the prevention and punishment of terrorism.¹⁵⁷

The convention provided a very broad definition of terrorism. It included provisions for criminal acts "directed against a state and intended to or calculated to create a state of terror in the minds of particular persons, or a group of persons, or the general public."¹⁵⁸ The convention failed to achieve international unanimity and received only one ratification and one accession and never came into force. "In large part this may have been because of the approach of World War II, but it has also been suggested that a number of states were reluctant to ratify the convention because of the breadth of its definition of terrorism."¹⁵⁹ Thereafter, the International Law Commission attempted to define terrorism in its 1954 Draft Code of Offenses Against the Peace and Security of Mankind and took a similar approach to defining terrorism, with a broad definition of terrorist acts.¹⁶⁰ In addition, the Draft Code attempted to introduce state sponsorship prohibitions in support of organized groups attempting to conduct terrorist acts in another state.¹⁶¹ However, the General Assembly deferred consideration of the Draft Code because of an inability to agree on a definition of

¹⁵⁶ MURPHY, *supra* note 149, at 4-5. (citing Frank & Lockwood, *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 AM. J. INT'L. L. 69, 73 n. 23 (1974)).

¹⁵⁷ MURPHY, *supra* note 149, at 5, (citing R. FRIEDLANDER, *TERRORISM* 253 (1979)). *See also* Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, *reprinted in* 7 HUDSON, INT'L. LEGIS. 862 (1941) [hereinafter 1937 Terrorism Convention].

¹⁵⁸ *See* Article 1(2), 1937 Terrorism Convention, *supra* note 157.

¹⁵⁹ MURPHY, *supra* note 149, at 5, (citing Frank & Lockwood, *supra* note 156, at 70).

¹⁶⁰ MURPHY, *supra* note 149, at 5, (citing 9 U.N. GAOR, supp. 9, at 11-12, U.N. Doc. A/2693 (1972)).

¹⁶¹ *See* Article 2(5) of Offenses Against the Peace and Security of Mankind, 9 U.N. GAOR, Supp. 9, U.N. Doc. A/2693 (1972).

aggression. An agreed definition for aggression was reached some twenty years later but there has, of yet, been no final agreement on the Draft Code of Offenses Against the Peace and Security of Mankind to date.¹⁶²

While there was some progress in the area of controlling and punishing terrorism in international aviation through the passage of the Tokyo, Hague and Montreal Conventions,¹⁶³ these initiatives were focused on international air transit and transportation as opposed to terrorism in general. They have been criticized in their effectiveness in combating terrorism as well. One scholar summarized the problems with these three conventions as follows:

The Conventions, however, do not constitute a truly effective constraint even on hijacking. In the first place, one-third of the United Nations' membership – including a good many States who either support or give sanctuary and safe-haven to terrorists – are not parties to them. Secondly, the prosecute-or-extradite obligation has been deemed subject to international law's traditional political offense exception, a doctrine originally designed to afford political asylum to opponents of repressive regimes, but one which too often in recent years has served as an escape clause for States anxious or willing to protect terrorists. Finally, the Conventions fail to provide for the application of sanctions against States which, while parties to them, simply refuse to comply at all.¹⁶⁴

Thus, while taking a different tack in proscribing terrorist actions by focusing on actions vice motives, these Conventions have not been entirely successful in achieving their desired purpose.

¹⁶² MURPHY, *supra* note 149, at 5.

¹⁶³ See *supra* note 147.

¹⁶⁴ RICHARD B. LILlich, TRANSNATIONAL TERRORISM: CONVENTIONS AND COMMENTARY xv-xvi, (Richard B. Lillich ed., 1982).

The kidnapping and killing of Israeli Olympic athletes in 1972 spurred a renewed attempt at fashioning a multilateral terrorism agreement.¹⁶⁵ As a result, the United States sponsored the Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism in 1972.¹⁶⁶ This proposal was severely criticized by Third World countries who proposed their own definition of terrorism as follows:

Terrorist acts are: 1) acts of violence and other repressive acts by colonial racist and alien regimes against people struggling for their liberation, for their legitimate right to self-determination, independence and other human rights and fundamental freedoms; 2) tolerating or assisting by a State, the organizations of the remnants of fascists or mercenary groups whose terrorist activity is directed against other sovereign countries; 3) Acts of violence committed by individuals or groups of individuals which endanger or take innocent lives or jeopardize fundamental freedoms. This should not affect the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and the legitimacy of their struggle, in particular of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant organs of the United Nations; 4) Acts of violence committed by individuals or groups of individuals for private gain, the effects of which are not confined to one state.¹⁶⁷

Thus, while developed countries, led by the United States, have attempted to proscribe all forms of terrorist conduct, Third World countries have historically rejected attempts to outlaw all forms of violence which may impinge upon the ability to overcome colonial

¹⁶⁵ "On September 8, 1972 Secretary-General Kurt Waldheim requested the inclusion in the agenda of the 27th Session of the General Assembly of an item on 'measures to prevent terrorism and other forms of violence which endanger or takes innocent human lives or jeopardizes fundamental freedoms.' (citation omitted). The Secretary-General's request was triggered by the kidnapping and killing of 11 Israeli athletes participating in the Olympiad" John Norton Moore, *The Need for an International Convention*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM 437 (M. Cherif Bassiouni ed., 1988).

¹⁶⁶ See MURPHY, *supra* note 149, at 5. See also U.S. Draft, Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, (proposed Sept. 26, 1972), reprinted in CONTROL OF TERRORISM: INTERNATIONAL DOCUMENTS 113 (Alexander, Browne, & Nanes, eds., 1979) [hereinafter Draft U.S. Proposal].

¹⁶⁷ Third World Proposal, Report of the Ad Hoc Committee on International Terrorism, 28 U.N. GAOR Supp. no. 28, at 21, U.N. Doc. A/9028 (1973), reprinted in Note, *Terrorism as a Tort in Violation of the Law of Nations*, 6 FORDHAM INT'L L.J. 236 (1982).

domination and racist regimes. The definitions in subparagraphs 1) and 3), listed above, are a vivid example of this point.

[W]hile terrorism may be perceived in the West . . . as a humanitarian problem, this is not the way it is perceived by most of the rest of the world. Most countries regard international terrorism as basically a political manifestation of the struggles against racist regimes such as South Africa, Rhodesia, and Israel . . .¹⁶⁸

During the general debate to the Draft Convention, this sentiment was expressed directly by the Libyan representative who characterized the U.S. initiative as a ploy "against the legitimate struggle of the people under the yoke of colonialism and alien domination."¹⁶⁹

The representative of Mauritania, in the debate, similarly stated:

[Terrorism should not] be held to apply to persons denied the most elementary human rights, dignity, freedom, and independence . . . and whose countries objected to foreign occupation . . . such peoples should not be blamed for committing desperate acts which in themselves were reprehensible; rather the real culprits were those responsible for causing such desperation.¹⁷⁰

These beliefs are not surprising given that a majority of Third World countries achieved independence via wars of national liberation over colonial or racist regimes. It is therefore understandable that much objection and disagreement befell any attempt at a broad definition of terrorism that threatened to encroach upon the ability of Third World nations to continue this ability. A thorough review of the history and debates surrounding the attempted passage

¹⁶⁸ Greene, *supra* note 155, at 472 (citing Ernest H. Evans, *American Policy Response to International Terrorism: Problems of Deterrence*, in *INTERNATIONAL TERRORISM IN THE CONTEMPORARY WORLD* 376, 381-82 (Marius H. Livingston ed., 1978)).

¹⁶⁹ Murphy, *United Nations Proposals on the Control and Repression of Terrorism*, in *INTERNATIONAL TERRORISM AND POLITICAL CRIMES* 493, 499 (M.C. Bassiouni, ed., 1975).

¹⁷⁰ Greene, *supra* note 155, at 472 (citing U.N. GAOR, General Comm., 27th Sess., 19th mtg. 24, U.N. Doc. A/C.6/SR/1362 (1979)).

of many anti-terrorist measures reveals this common thread expressed by third-world countries. Their fear has consistently been that the language of the conventions would preclude their ability to wage a campaign against dominant and oppressive regimes.

The U.S. Draft Convention failed. The General Assembly passed Resolution 3034 which became a document of aspiration vice prohibition. It expressed deep concern over the increasing reign of terrorist violence and sought international support for further multilateral agreements and cooperation in eliminating terrorism.¹⁷¹ Third World nations also achieved a victory. The Resolution contained a clause which stated that it “reaffirms the inalienable right of self-determination and independence of all peoples under the colonial and racist regimes and other forms of alien domination and upholds the legitimacy of their struggle.”¹⁷² Thus, Third World countries succeeded in holding off the U.S. initiative. The Resolution established an ad hoc committee to study the problem of terrorism.¹⁷³ The Committee met from July 16 through August 10, 1973, but reported that it was unable to agree on any recommendations for dealing with the problem.¹⁷⁴

The Draft Convention was the latest multilateral treaty to attempt to define terrorism directly, until the 1997 International Convention for the Suppression of Terrorist Bombings, discussed below, was proposed. Having just stated this proposition, it should not be left out that the International Law Association proposed the Draft Single Convention on the Legal

¹⁷¹ MURPHY, *supra* note 149, at 7.

¹⁷² G.A. Res. 3034, *reprinted in* 14 UNITED NATIONS RESOLUTIONS, SERIES I, GENERAL ASSEMBLY 355 (Dusan Djonovich ed., 1978).

¹⁷³ *Id.*

¹⁷⁴ MURPHY, *supra* note 149, at 7.

Control of International Terrorism in 1980.¹⁷⁵ The aim stated by the Conference was to “provide innovative guidance to States in the development of a common international standard for legal control of international terrorism by defining ‘international terrorist offences’ more broadly than do previous conventions, by barring such offences from inclusion in any political offence exception”¹⁷⁶ The Draft Convention was the culmination of an ongoing project which began in 1974 at the 56th Conference held in New Delhi.¹⁷⁷ Needless to say, the Draft Convention never received any sponsorship for actual submission because of its broad definition, and negation of the political offense exception. Recall that these were the common themes behind the failure of the 1937 Terrorism Convention and Draft U.S. Convention. This failure was recognized in the Sixtieth Conference in Montreal and the Sixty-First Conference held in Paris in 1984.¹⁷⁸ The result was a Draft Resolution setting forth a Statement of Principle, a Working Definition, and Rules of Law to be used in future proposed conventions.¹⁷⁹ The Proposed Draft Resolution was adopted as substantive Resolution No. 7/1984.¹⁸⁰ It provided the same broad definition of terrorist activity with limits on the political offense exception proposed in the Draft Convention. The Director of Studies, recognizing the problems facing another Proposed Convention, sought renewal of the Committee’s mandate from the Council and was his request was granted. The Committee was disbanded and a new Committee was to be formed

¹⁷⁵ See International Law Association, *Report of the Fifty-Ninth Conference*, held at Belgrade, at 497 (1982).

¹⁷⁶ *Id.* at 496.

¹⁷⁷ *Id.*

¹⁷⁸ See International Law Association, *Report of the Sixty-First Conference*, held at Paris, at 319 (1985).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 323.

to study the problem of international terrorism and extradition.¹⁸¹ Thus, while the International Law Association attempted to provide a broad-based definition in its Draft Convention, it suffered similar treatment to the 1972 U.S. Proposed Draft and did not even gain official sponsorship.

In the interim period between the Draft Convention and the 1997 Terrorist Bombing Convention, several treaties, listed above,¹⁸² were passed dealing with terrorist activities. However, these treaties proscribe the listed activities whether or not they are "terrorist" events. Thus, while they impact on terrorist activities, and contain language decrying terrorism in their preamble statements, they are not solely dedicated to combat terrorism. Their focus is instead on activities which also involve terrorist threats. In addition, during this same period, several General Assembly Resolutions and regional agreements were passed in the effort to combat terrorism.¹⁸³ These agreements and Resolutions will not be discussed here because of their limited ability directly to proscribe terrorism through binding multilateral agreements. However, they will be discussed below for their ability to impose international duties upon states outside of the multilateral agreement arena.¹⁸⁴

To summarize, several multilateral agreements were made covering criminal actions which also include terrorist activity. Additionally, several proposals for international

¹⁸¹ *Id.* at 323-24.

¹⁸² *See supra* note 147.

¹⁸³ *See generally* G.A. Res. 40/61, 40 U.N. GAOR, Supp. No. 53, at 301, U.N. Doc. A/40/53 (1985) *reprinted in* 25 I.L.M. 239 (1986); Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413, O.A.S.T.S. No. 37, at 6, O.A.S. Doc. OEA/Ser.A/17, as examples.

¹⁸⁴ *See supra* notes 275 to 288 and accompanying text.

agreements were made which broadly defined terrorist activities from the period of 1971 to 1997. General Assembly Resolutions were also passed, denouncing terrorism and terrorist activities and calling upon all nations to cooperate in the fight against international terrorism. However, no broad-based agreements were proposed to broadly define and proscribe terrorist actions and terrorism until the 1997 Proposed International Convention which is still pending adoption and ratification by the world community. As will be discussed below, this latest agreement suffers from similar deficiencies that the 1971 Proposed U.S. Agreement suffered as highlighted above.

The Sixth Committee of the United Nations General Assembly was tasked with examining measures to eliminate international terrorism.¹⁸⁵ Unfortunately, this proposed agreement suffers from the same weaknesses as those before it in attempting to broadly define and proscribe terrorism and terrorist activity. At its 30th meeting, on November 14, 1997, the Costa Rican member of the Sixth Committee introduced a Draft Resolution entitled "International Convention for the Suppression of Terrorist Bombings."¹⁸⁶ This Draft Resolution was amended at its 33rd Meeting on November 19, 1997, on a motion by Pakistan which added the following additional preambular paragraph to the Draft Resolution:

Recalling also General Assembly Resolution 46/51 of 9 December 1991, reaffirming the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and foreign occupation, and upholding the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and Declaration on Principles of

¹⁸⁵ See International Convention for the Suppression of Terrorist Bombings, *supra* note 147, at 1.

¹⁸⁶ *Id.* at 2. See also the Committee Report at U.N. Doc. A/C.6/52/L.13.

International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.¹⁸⁷

This addition was adopted by the Committee but sparked debate in which representatives of Pakistan, the Islamic Republic of Iran, Iraq, the Syrian Arab Republic, Algeria, New Zealand, the Libyan Arab Jamahiraya, Canada, Lebanon, Japan, India, Turkey and Jamaica made statements in explanation of position.¹⁸⁸ This, in turn, prompted a Draft Resolution sponsored by Sri Lanka and a Draft Decision by the Russian Federation.¹⁸⁹ The resultant final Draft Resolution, and its annexed International Convention, recommended by the Sixth Committee to the General Assembly contained a broad definition of terrorist actions focused on eliminating terrorist bombings.¹⁹⁰ Additionally, Article 5 of the Proposed Convention stated that the proscribed actions were not justifiable by “political, philosophical, ideological, racial, ethnic, religious or similar nature.”¹⁹¹ Article 11 provided that extradition or requests for mutual legal assistance could not be refused on the sole ground that the complained activity concerned a political offense.¹⁹² But, Article 12 creates a significant problem in interpretation and enforcement of the Proposed Agreement. It states:

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offenses

¹⁸⁷ *Id.* See also U.N. Doc. A/C.6/52/L.13.

¹⁸⁸ See U.N. Doc. A/C.6/52/SR.33. These nations strongly advocated the position of Third World countries and the necessity for inclusion of the new preambular language to the Draft Resolution to allow these countries the ability to fight racist regimes and colonial domination.

¹⁸⁹ See U.N. Doc. A/C.6/52/L.21, and U.N. Doc. A/C.6/52/L.22 respectively.

¹⁹⁰ See Article 2, International Convention for the Suppression of Terrorist Bombings, *supra* note 147, at 8.

¹⁹¹ *Id.* at 9.

¹⁹² *Id.* at 12.

set forth in article 2 or for mutual legal assistance with respect to such offense has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.¹⁹³

The Proposed Agreement thereby suffers from the same difficulties as past attempted agreements with broad definitions of terrorism or terrorist activities. Even if this Proposed Agreement is adopted and ratified by the world community, Article 12 leaves the option open to States which condone or support terrorism, not to extradite, cooperate or prosecute if they determine the action is against the suspected terrorist's race, religion, nationality, ethnic origin, or political opinion. The result is that the Proposed Agreement, in reality, offers no more prohibition on terrorist acts than any other agreement passed to this date. It is another example of the tension between Third World countries protecting their perceived need to overthrow racist and colonial regimes, and the world community's attempt to regulate terrorism.

To summarize, international agreements proscribing terrorism or terrorist activities have been largely ineffectual. The definitional problems associated with defining terrorist activity and terrorism are a key weak point in these agreements. Additionally, the reluctance of Third World countries to adopt and enforce new and existing agreements for fear of losing their ability to fight colonial domination and racist regimes adds to this weakness. Finally, the compromises contained within existing agreements, coupled with the political offense exception under customary international law, makes the extradite-or-prosecute option a toothless remedy. This is presently demonstrated by Libya's refusal to extradite the bombing

¹⁹³ *Id.*

suspects for the Pan Am Flight 103 bombing.¹⁹⁴ The resultant ineffectiveness and inability to reach accord in international agreements, coupled with the selective enforcement of existing agreements, has left States with the choice of doing nothing or using force as the primary method of dealing with terrorism and terrorist activity. The debate associated with this practice, and the U.S. position legitimizing the use of force will be discussed below.

IV. Proposed Legal Basis and Means for Dealing with International Terrorism: Extending Humanitarian Intervention to Provide for Protecting a Nation's Citizens Against International Terrorism. The U.S. Paradigm of Humanitarian Self-Defense.

The regulation of the use of force has developed slowly because of the shifts in power in the international community. Reflect on the difficulty reaching agreement and accord within our own country, then magnify this 100 times in the international community and the difficulty becomes clearer.¹⁹⁵ Therefore, our major focus and point of review is the shift from customary law, which previously regulated the use of force, to treaty-law and the extent to which customary law was displaced by treaty law. It is therefore necessary to trace the historical parameters of the customary international legal principle, which allowed humanitarian intervention to protect a nation's nationals. Once the limits and existence of this principle have been explored, the next issue must be to determine whether that customary principle was displaced by the United Nations Charter.

¹⁹⁴

¹⁹⁵ Waldock, *supra* note 32, at 455.

A. *Customary International Law Providing For Humanitarian Intervention.*

1. *Pre-United Nations Charter.*

Historically, Hugo Grotius and other legal scholars and philosophers developed the just war principles to attempt to regulate the resort to war, which resulted in carnage and human horrors of the battlefield. However, because there was no international body to apply these principles and enforce them, the justness of war was left to the belligerent parties to sort out. This eventually led to the abandonment of the concept because no uniformity existed in the application of the just war concept.¹⁹⁶ Because the just war concept was indefinite and not useful, and was subject to various levels of interpretation, resort to means less than war developed with their own rules and were classified as "pacific" modes of settling disputes.¹⁹⁷ One of these means was the doctrine of forcible self-help. Under forcible self-help, there was generally found no international law violation for the intrusion into the sovereign territory of another nation for limited circumstances. The doctrine of forcible self-help, or humanitarian intervention to protect a nation's citizens,¹⁹⁸ was one such circumstance:

... by requiring a state to accord a minimum standard of treatment to aliens,
traditional international law provided some protection for the human rights of

¹⁹⁶ Waldock, *supra* note 32, at 457.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 458. It should be noted at this point that the term "humanitarian intervention" as used in this article refers only to that action taken to protect a nation's citizens from harm. This article draws support for its conclusion from the related concept of humanitarian intervention to protect a third nation's citizens from atrocities and human rights violations by their own sovereign.

individuals when abroad. The power to enforce compliance with these standards rested in the state to which the alien owed allegiance, with the measures available to the sanctioning state ranging from diplomatic notes through forcible self-help to actual war.¹⁹⁹

It can scarcely be argued, at least prior to 1945, that customary international law provided for the right of forcible self-help to protect the lives of a nation's nationals living in another state if there was a complete breakdown of law and order in that other state.²⁰⁰ In fact, one commentator and scholar has commented, "under customary international law, it was blackletter law that a state, invoking its right of forcible self-help, could send its Navy and land its Marines to protect the lives of its citizens in such situations."²⁰¹ "As far as humanitarian intervention's legality is concerned, the present writer concluded some years ago that 'the doctrine appears to have been so clearly established under customary international law, that only its limits and not its existence is subject to debate.'"²⁰² Another scholar has commented:

¹⁹⁹ Lillich, *supra* note 144, at 208 (citing E. Borchard, *The Diplomatic Protection of Citizen's Abroad* 448-53 (1915)).

²⁰⁰ See generally, BOWETT, *supra* note 52; DUNN, *THE PROTECTION OF NATIONALS*, (1932); C. HYDE, 1 *INTERNATIONAL LAW* (1945); JESSUP, *supra* note 96; L. OPPENHEIMER, 1 *INTERNATIONAL LAW* (1955); BROWNLIE, *supra* note 130, at 289-296; Waldock, *supra* note 32, at 499-503.

²⁰¹ RICHARD B. LILlich, 62 U.S. NAVAL WAR COLLEGE, *INTERNATIONAL LAW STUDIES* x, (Richard B. Lillich & John Norton Moore eds., 1980).

²⁰² FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 243 (Donald P. Kommers & Gilbert D. Loescher, eds., 2d Ed. 1996), (citing Richard B. Lillich, *A United States Policy of Humanitarian Intervention and Intercession*, in *HUMAN RIGHTS AND AMERICAN FOREIGN POLICY* 278, 287-90). See also *Anglo-Spanish Arbitrations, Beni-Madan, Rzini Claim*, 2 UNRIAA 616 (1925) cited in BOWETT, *supra* note 52, at 88.

In the arbitration between Great Britain and Spain in 1925, one of the series known as the *Spanish Moroccan Claims*, Judge Huber, as rapporteur of the commission, stated: However it cannot be denied that at a certain point the interest of a State in exercising protection over its nationals and their property can take precedence over territorial

Before the United Nations Charter was signed on June 26, 1945, customary international law recognized two grounds on which a state or group of states could intrude into the sovereign territory of another state for humanitarian purposes. The first allowed a state to intervene with armed force to protect the interests of its nationals abroad. In numerous cases during the 19th and early 20th centuries, the United States projected force abroad in just such a manner to protect the lives and property of its citizens. Later, the scope of this theory narrowed to those occasions where the lives of the intervening state's citizens were in imminent danger.²⁰³

Still another has said, "[t]he right of a state to intervene by the use or threat of force for the protection of its nationals suffering injuries within the territory of another state is generally admitted, both in the writings of jurists and in the practice of states."²⁰⁴

Oppenheim similarly states, "[t]he right of protection over citizen's abroad, which a state holds, may cause an intervention by right to which the other party is legally bound to submit. And it matters not whether protection of the life, security, honor or property of a citizen abroad is concerned."²⁰⁵ Thus, the existence of the right of self-help to protect nationals was not disputed prior to 1945. It must then be determined what the limitations were for that action.

sovereignty, despite the absence of any conventional provisions. This right of intervention has been claimed by all states; only its limits are disputed.

Id.

²⁰³ Major Steven F. Day, *Legal Considerations in Noncombatant Evacuation Operations*, 40 NAVAL L. REV. 45, 48 (1992), (citing Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 198 (Richard B. Lillich ed., 1973) (citations omitted)).

²⁰⁴ BOWETT, *supra* note 52, at 87.

²⁰⁵ OPPENHEIM, *supra* note 200, at 309.

Generally speaking, for the right of forcible self-help to protect nationals to obtain under international law, several requisite and prerequisite actions had to occur. First, there had to be an imminent threat an intervening state's nationals.²⁰⁶ Second, there must have been a failure or inability on the part of the territorial sovereign to protect nationals of the intervening state.²⁰⁷ Third, the measures of intervention used had to be strictly confined to the object of protecting the nationals from harm.²⁰⁸ States failing to meet these requirements for intervention were generally found to have violated the doctrine of self-help.²⁰⁹

2. *Post-United Nations Charter.*

Many international scholars have argued that the pre-Charter basis for humanitarian intervention was supplanted by the passage of Article 2, Section 4 of the Charter.²¹⁰ These arguments are collectively known as the restrictive view. The inherent conflict between the right of forced entry previously enjoyed, and the prohibition against violating the territorial integrity of another nation as proscribed under the Charter, led to the conclusion that the

²⁰⁶ BOWETT, *supra* note 52, at 88; Waldock, *supra* note 32, at 467.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See e.g., NEWMAN & WEISSBRODT, *supra* note 202, at 243; Fonteyne, *supra* note 203, at 198; NEWMAN & WEISSBRODT, *supra* note 202, at 247 (citing Tom J. Farer et al., *The United States and the Use of Force: Looking Back to See Ahead*, 1 TRANSNAT'L L. & CONTEMP. PROBS. 15, 16, 19, 28-38 (1991)); Wright, *The Legality of Intervention Under the United Nations Charter*, 51 AM. SOC'Y INT'L L. PROCEEDINGS 79, 88 (1957).

previous state practice no longer enjoyed customary status.²¹¹ From this argument, several positions have been proposed for the proposition that the prior customary rule was not supplanted, or that it exists nevertheless. These arguments are collectively known as the permissivist view.²¹² It should be noted that the restrictive view focuses on the protection of peace purposes of the Charter. The permissive view places its emphasis on the protection of fundamental human rights as an equally important purpose of the Charter. Therefore, it seeks an overall balance of justice between the protection of human rights and the international requirements of peace.

There have been at least five bases proposed for arguing that the United Nations Charter did not supplant customary international law provisions of self-help. First, a literalist interpretation that self-help actions are not directed at the territorial integrity or political independence of another state and are therefore not prohibited under the plain language of Article 2(4).²¹³ Recall that the literalist interpretation was considered and rejected above in the section dealing with acts not directed at the territorial integrity or political independence of another state.²¹⁴ Second, humanitarian intervention violates the Charter but is acceptable

²¹¹ Phillip Jessup concluded that the notion of forcible self-help by states did not survive the passage of the U.N. Charter. See JESSUP, *supra* note 96, at 169-170. Interestingly, Judge Jessup did offer a caveat to his opinion stating that if the Military Staff Committee of the Security Council couldn't act with the necessary speed to preserve life, traditional notions of self-help could be allowable. *Id.* See also THOMAS, *supra* note 34, at 312, for the proposition that the pre-Charter right of self-help only extended to non-forceful measures, or measures of retaliation, after the passage of the Charter. The Thomases also added possible alternatives to validate self-help efforts in the post-Charter era. The first argument they proposed was that forcible self-help to protect nationals is not directed at the territorial integrity or political independence of another state. *Id.*, at 15, n. 26. This is an argument discounted above in section IIA(3). The second argument they proposed was that the concept of forcible self-help is a valid extension of the concept of self-defense with which this author agrees and will comment on below. *Id.*, at 13.

²¹² Edmunds, *supra* note 121, at 143-44.

²¹³ NEWMAN & WEISSBRODT, *supra* note 202, at 243. See also STONE, *supra* note 43, at 45.

²¹⁴ See *supra* notes 119 to 136 and accompanying text.

on moral grounds.²¹⁵ This does not fare any better than peacetime reprisal in compliance with international law. In fact, this possibility is not founded on legal principles and precedents at all. Rather, it is a sociologically and politically based possibility, analyzed outside the spectrum of international law. Thus, this argument does not rely upon legal bases for its validity, but rather on considerations of public policy and moral choice.²¹⁶ While it is conceded that public policy and moral choice play an important role in determining the justness of an action, they cannot be the sole basis for intervention. This view has drawn criticism from John Norton Moore and Richard Lillich for its lack of legal analysis and guidance.²¹⁷ Third, a teleological view that Article 2(4) cannot be read singly and must be read with the purposes of the Charter in its entirety. The basic argument presented under the teleological view is as follows:

The task of treaty interpretation, especially the interpretation of constitutional documents devised, as was the United Nations Charter, for the developing future, is not one of discovering and extracting from isolated words some mystical pre-existent, reified meaning but rather one of giving that meaning to both words and acts, in total context, which is required by the principal, general purposes and demands projected by the parties to the agreement.²¹⁸

²¹⁵ *Id.*

²¹⁶ See Ian Brownlie, *Thoughts on Kind-Hearted Gunmen*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 146 (Richard B. Lillich ed., 1973).

²¹⁷ See comments by John Norton Moore and Richard B. Lillich, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS*, *supra* note 216, at 120 and 188 respectively.

²¹⁸ McDougal & Feliciano, *Conditions and the Expectation of Necessity, Law and Minimum World Public Order*, in *NATIONAL SECURITY LAW* 107 (John Norton Moore, Frederick S. Tipson and Robert F. Turner eds., 1990).

By considering the Preamble to the Charter, Article 1, and Articles 55 and 56, there is a strong argument presented by Reisman and others that the fundamental purpose of the Charter was the protection of human rights.²¹⁹ Reisman views the doctrine of self-help as:

... a logical extension of concern for norms that are rooted firmly in the charter. One must look to the dominant purposes of the charter as a whole and not blindly allow a single general principle like Article 2(4) – admirable though that principle may be – to impede other major goals of the charter.²²⁰

This view argues that Article 2(4) must be read in connection with the purposes of the Charter, and be a logical extension of the Charter. Therefore, when viewed against the purposes of the Charter as a whole, Article 2(4) does not prohibit forcible self-help to protect humanitarian concerns.²²¹ Fourth, the pre-Charter customary right of forcible self-help revives when the Charter provisions for U.N. action are ineffective or unfeasible.²²² Here it is argued that because the collective enforcement procedures have not worked as planned, or are unable to cope with the particular situation, there is a choice between doing nothing or employing stopgap measures to protect human life.²²³ Proponents of this view argue that the former choice is untenable. Fifth, Article 51 provisions for self-defense logically spin-off, or encompass the pre-Charter practice of forcible self-help.²²⁴ While the proponent of this view

²¹⁹ See e.g., W. Reisman, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS, *supra* note 217, at 175.

²²⁰ Richard B. Lillich, *A United States Policy of Humanitarian Intervention and Intercession*, in HUMAN RIGHTS AND AMERICAN FOREIGN POLICY 288-89, (Donald P. Koomers & Gilbert D. Loescher eds., 1979) (summarizing Reisman's arguments, see *supra* note 219).

²²¹ *Id.*

²²² NEWMAN & WEISSBRODT, *supra* note 202, at 244; *comments of* Richard R. Baxter, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS, *supra* note 217, at 54.

²²³ Baxter, *supra* note 152, at 54.

²²⁴ Day, *supra* note 203, at 49.

correctly identifies the U.S. position since it was first articulated after the Entebbe Raid in 1976,²²⁵ he, like the United States, has failed to provide the legal foundation to support this view. It is the purpose of this paper, similar to the often-ridiculed requirements of math teachers, is to show the work which establishes this basis. Because the “literalist” and “moral grounds” bases are not legally supportable, we must consider the remaining bases to determine possible viability for the proposition that forcible self-help survived passage of the Charter. The author believes that a combination of the three remaining views provides strong evidence that the pre-Charter right of self-help to protect nationals has survived the adoption of the U.N. Charter and is a logical extension and inclusion in Article 51’s inherent rights in self-defense. Alternatively, should the Charter have extinguished this pre-Charter right, the practice of nations has expanded the parameters of Article 51 beyond its traditional concept as set forth in *Caroline* due to the inability of the Charter provisions to perform adequately. The arguments supporting this proposition are set out below.

B. Analyzing the Teleological View: Protection of Human Rights and a Nation’s Citizens, a Permissive or Obligatory Role of International Law and States?

Before discussing particular obligations and roles of international law and states in protecting human rights, we must first determine the sources of modern international law to identify those roles and obligations. Article 38 of the International Court of Justice, which is

²²⁵ See *supra* note 19 and accompanying text.

annexed to the Charter of the United Nations at Article 93, identifies, in descending order of precedence, the following sources of international law:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted by law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59 [restricting the binding force of the decision to the case at hand]' judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.²²⁶

The United States Supreme Court has also held, "[w]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations"²²⁷ Customary international law is developed through the practice of nations, where their actions are conducted out of a sense of legal obligation otherwise known as *opinio juris*.²²⁸ This holding thereby comports with Article 38(b) of the Statute of the Court. Additionally, the practice and opinions of international organizations may create customary international law.²²⁹ Once customary international law is created, it is binding on all states.²³⁰ The Restatement of the Law, Third, Foreign Relations Law of the United States, is the U.S. bible, or compilation and interpretation of international law. Section 102, of the Restatement describes and defines sources of international law.²³¹ Section

²²⁶ Statute of the International Court of Justice, Art. 38, (1948) annexed to the U.N. Charter.

²²⁷ The Paquette Habana, (The Lola), 175 U.S. 677, 700 (1900) (citing Hilton v. Guyot, 15p U.S. 113, 163-64 (1895)).

²²⁸ BRIERLY, *supra* note 70, at 59-62.

²²⁹ See L. HENKIN, INTERNATIONAL LAW 37-69 (1987), (Provides a discussion of the sources of international law).

²³⁰ *Id.*

²³¹ RESTATEMENT OF THE LAW (THIRD): THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

102 essentially mirrors the sources in Article 38 of the Statute of the International Court of Justice. The Restatement states that customary international law, “results from a general and consistent practice of states followed by them from a sense of legal obligation.”²³² The comment to the section provides that the “practice of states,” as stated above, “includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy.”²³³ The Reporter’s notes to the Section also state that United Nations General Assembly Resolutions, Declarations and other statements of principles may also provide evidence of customary law.²³⁴ These Resolutions, Declarations and statements of principle provide evidence of state practices and may be expressions of *opinio juris*, which can assist in ascertaining customary international law. As an explanation for this point, the Reporter’s notes state:

The contributions of such resolutions and of the statements and votes supporting them to the lawmaking process will differ widely, depending on factors such as the subject of the resolution, whether it purports to reflect legal principles, how large a majority it commands *and how numerous and important are the dissenting states*, whether it is widely supported (including in particular the states principally affected), and whether it is later confirmed by other practice. ‘Declarations of principles’ may have greater significance than ordinary resolutions.²³⁵

Section 103 of the Restatement describes the evidence that tends to establish international law. It is similar to the secondary sources listed in Article 38 of the Statute of the

²³² *Id.*

²³³ *Id.* cmt. b.

²³⁴ *Id.* reporter’s note 2.

²³⁵ *Id.* (emphasis added).

International Court of Justice. Section 103 describes evidence that tends to prove international law as follows:

- (2) In determining whether a rule has become international law, substantial weight is accorded to
 - (a) judgments and opinions of international judicial and arbitral tribunals;
 - (b) judgments and opinions of national judicial tribunals;
 - (c) the writings of scholars;
 - (d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.²³⁶

The commentary to Section 103 provides further guidance to these rules of construction. The commentary states that the decisions of international courts are persuasive of what the law is and, in particular, decisions of the International Court of Justice are given great weight.²³⁷ It also states that declaratory resolutions of international organizations provide some evidence of the law, and that resolutions of universal international organizations, “if adopted by consensus or virtual unanimity are given substantial weight.”²³⁸ The Reporter’s Notes also discuss the effect of writings of international law scholars. Included in the Reporter’s Notes, in addition to the common perception of writings by international scholars, are resolutions of scholarly bodies such as the Institute of International Law, the International Law Association, and draft reports of the International Law Commission.²³⁹ “The views of

²³⁶ *Id.* § 103.

²³⁷ *Id.* cmt. b.

²³⁸ *Id.* cmt. c.

²³⁹ *Id.* Reporter’s Note 1.

the International Law Commission have sometimes been considered especially authoritative.”²⁴⁰

The preceding review of sources and evidence of international law was provided to allow the reader to put the following discussion of the roles and obligations of nations to prevent and protect against terrorism and terrorist acts in context. Terrorism prohibitions and duties, and fundamental human rights are developing areas of the law. By applying the aforementioned principles to the court decisions, international legal declarations, practices by states, and writings by scholars, the author proposes that the U.S. paradigm of *humanitarian self-defense* will be established as a viable, legally supportable basis to fight against international terrorism.

The United Nations Charter, like the United States Constitution, was a document meant to survive the passage of time and the development of nations. Therefore, the provisions of the Charter and its prohibitions must be balanced against the practice of nations, and the purposes the Charter desired to be protected, in order that the Charter remain a valid, living instrument. To hold the meaning of provisions under some “mystical pre-existent, reified meaning” stops the Charter from being a useful instrument as nations of the world progress and leave non-useful provisions behind. “[I]t was never intended that the Charter should embody written confirmation of every essential principle of international law in force.”²⁴¹ Related to this teleological view are each nation’s international legal obligations outside the Charter that also provide context and meaning to its provisions. Some of these legal

²⁴⁰ *Id.*

²⁴¹ Nicaragua case, *supra* note 134, at 106.

obligations will be discussed below because they directly impact on the relationship between the Charter, international legal obligations, and the doctrine of self-help. This segues into the inability of the United Nations to respond to international terrorism. As discussed above in the section dealing with Security Council actions, the United Nations process is ill equipped and unable to deal with the problem of international terrorism. Therefore, we must determine not only the nature and purpose of the Charter and other international legal obligations on this question, but also the extent to which the pre-Charter practice of self-help either survived the passage of the Charter, or expanded its provisions, through an analysis of the practice of nations. This is necessary because the pre-Charter practices, and the Charter provisions themselves, can be modified by the practice of nations.

Before World War II, universal human rights appeals and laws played almost no part in international politics. The focus was on the relationships between sovereign states.²⁴² States were free to do anything they wanted with their own nationals under the tenets of the inviolability of state sovereignty. But, the experiences of World War Two, the Jewish holocaust and occupation atrocities, “prompted a profound reconsideration of the relationship between human rights and international peace.”²⁴³ The United Nations was born as a collective security body to prevent and punish international breaches of the peace and violations of fundamental human rights. A state’s treatment of its own citizens officially became the subject of international concern because a state’s abuses of its own citizens could result in breaches of the peace, thereby posing a threat to other countries, and thus

²⁴² David Manasian, *A Survey of Human Rights Law*, THE ECONOMIST 3, 4 (1998)[hereinafter ECONOMIST].

²⁴³ *Id.* See also NEWMAN & WEISSBRODT, *supra* note 202, at 5-6.

international peace and security could be at risk.²⁴⁴ One of the guiding principles and the impetus for the creation of the U.N. Charter was to reaffirm faith in fundamental human rights. Within Article 1, it states that the principal purpose of the Charter is, “promoting and encouraging respect for human rights and for fundamental freedoms for all.”²⁴⁵ Additionally, Articles 55 and 56 provide for “universal respect for, and observance of, human rights and fundamental freedoms . . .”²⁴⁶ The Articles specifically link human rights to the maintenance of peace and security under the Charter. One scholar has commented, “[t]he U.N. Charter was designed not only to abolish the use of aggressive force, but also to protect human rights . . . [t]he use of coercion to achieve the objective of protecting human rights may be required, particularly if the built-in sanctions of the Charter do not work.”²⁴⁷

The Universal Declaration of Human Rights²⁴⁸ also explicitly linked respect for human rights to the maintenance of international peace.²⁴⁹ The Declaration added specificity to the goals set out in Articles 55 and 56 of the Charter, and specifically linked the attainment of those specific goals to the ability to maintain peace in the international community. The

²⁴⁴ *Id.* See also NEWMAN & WEISSBRODT *supra* note 202, at 8.

²⁴⁵ U.N. CHARTER, art. 1.

²⁴⁶ U.N. CHARTER, art. 55, 56.

²⁴⁷ Richard B. Lillich, *Forcible Self-Help Under International Law*, in 62 INTERNATIONAL LAW STUDIES 130 (Richard B. Lillich & John Norton Moore eds., 1980).

²⁴⁸ G.A. Res. 217(a)(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

²⁴⁹ ECONOMIST, *supra* note 242, at 4.

By joining the treaties, most governments have now signed on to the idea that human rights clearly limit their sovereignty, and create obligations to the entire community of states, maintains Theodor Meron, a professor of international law at New York University. Eventually a government's claim to sovereignty may depend upon whether it respects the basic human rights of its citizens.

Id. at 16.

basic and most fundamental right in the Universal Declaration was the protection of life.²⁵⁰

While the declaration is considered to be aspirational only, due to its lack of enforcement mechanisms, its passage in close proximity to the Charter provides persuasive evidence of one of the Charter's purposes.

There is further support for the proposition that the U.N. Charter encompasses protection for fundamental human rights and therefore must be read in context with its overall intent and the changes in international law. Recent judicial decisions have added significant authority to this view. The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991²⁵¹ affirmed this shift in focus from a state sovereignty based system of international law, to a system inextricably linked to fundamental human rights. The Tribunal reviewed the legality of its jurisdiction over an individual charged with human rights violations in former Yugoslavia. The Tribunal upheld the jurisdiction conferred upon it by the United Nations Security Council, pursuant to Chapter VII, to hold individuals responsible for cross-boundary crimes violative of fundamental human rights principles, despite Article 2(7)'s prohibition of interfering in inherently domestic issues. The Appellant, Dusko Tadic, had initially argued that the alleged crimes he was being tried for were essentially internal matters falling within the jurisdiction of the sovereign where the infractions occurred. In its decision, the Tribunal made ground-breaking findings concerning the status of international law and its relationship to sovereignty outside the bounds of

²⁵⁰ *Supra* note 248, at art. 3.

²⁵¹ The tribunal was created in response to gross human rights violations in the former republic of Yugoslavia. The Tribunal was originally established by statute contained as an annex to a report by the Secretary General to the Security Council found at Security Council Resolution 808, U.N. Doc. S/25704 (1993). The statute was adopted by Security Council Resolution 827 on May 25, 1993.

declared war. Drawing upon language gleaned from post-World War II cases and principles involving international war crimes,²⁵² the *Tadic* court found that individual crimes that violate fundamental human rights challenge the foundations of civilized society and cross international jurisdictional boundaries, and in doing so, traditional notions of sovereignty yield to the requirements of international society.²⁵³

The public revulsion against similar offenses in the 1990s brought about a reaction on the part of the community of nations . . . to deal with transboundary matters which, though domestic in nature, may affect 'international peace and security.' (citations omitted). It would be a travesty of law and a betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised against the reach of the law and as a protection to those who trample underfoot the most elementary rights of humanity.²⁵⁴

In a similar fashion, the Tribunal overcame the political exception doctrine by analogizing the human rights violations of *Tadic*, in a common Article 3 conflict,²⁵⁵ to war crimes in World War II. It does so by citing to some interesting language from the *Wagener* decision:

²⁵² See Case of General Wagener, in *Rivista Penale* 753, 757 (Sup. Mil. Trib., Italy 1950); Israel v. Eichmann, 36 Int'l L. Reports 277, 291-293 (Isr. S. Ct. 1962); Federation de Deportes et Internes Resistants et Patriotes and Others v. Barbie, 78 Int'l L. Reports 125, 130 (Cass. Crim. 1983).

²⁵³ Prosecutor v. Tadic, 35 I.L.M. 32, 51-52 (1996), available at <<http://www.un.org/icty/tadic/appeal/decision-ace1-1.htm>>. This same sovereignty objection was raised and overturned in Prosecutor v. Kenyabashi 92 AM. J. INT'L L. 66, 68 (1998) (Decision on Jurisdiction), involving the Criminal Tribunal for humanitarian violations in Rwanda.

²⁵⁴ *Id.* at 51.

²⁵⁵ Common Article 3 was originally intended to serve as a preface to the four Geneva Conventions regulating conduct during war. It was instead adopted as the law to regulate non-international, or internal, armed conflicts. The Article was a compromise to provide for a limited number of protections to safeguard fundamental human rights in internal armed conflicts. Jean S. Pictet, THE GENEVA CONVENTIONS OF 12 AUGUST 1949 – INTERNATIONAL COMMITTEE OF THE RED CROSS COMMENTARY TO GENEVA CONVENTION NO. IV, 25-34 (1958).

Crimes against the laws and customs of war cannot be considered political offences, as they do not harm a political interest of a particular state, nor a political right of a particular person. They are, instead, crimes of *lese humaine* (*reati di lesa umanità*) and, as previously demonstrated, the norms prohibiting them have a universal character, not simply a territorial one. Such crimes, therefore, due to their very subject matter and particular nature . . . are to be opposed and punished, in the same way as the crimes of piracy, trade of women and minors, and enslavement are to be opposed and punished, wherever they may have been committed²⁵⁶

The Tribunal held that sovereignty-oriented international law has been gradually supplanted by a human-being-oriented approach. Specifically, it stated:

Whenever armed violence erupted in the international community, in traditional international law the legal response was based on a stark dichotomy: belligerency or insurgency. The former category applied to armed conflicts between sovereign states . . . while the latter applied to armed violence breaking out in the territory of a sovereign state. (*Text omitted*). Since the 1930s, however, the aforementioned distinction has gradually become increasingly blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. (*Text omitted*). A state-sovereignty approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in an area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted “only” within the territory of a sovereign State?²⁵⁷

These same legal rationales apply to the obligation of states to respond to international terrorism. It is axiomatic to state that the entire world views international terrorism as a threat to international peace and security and fundamental human rights. Yet, the global

²⁵⁶ *Id.* (citing Wagener, *supra* note 252, at 757.

²⁵⁷ Tadic, *supra* note 253, at 47-48.

response to this threat is continually veiled behind the antiquated thread of "traditional" notions of self-defense, which grow increasingly weak. The international response to the recent U.S. attacks exemplifies this international frustration. However, the United States has embraced and incorporated this emerging focus on human rights and justice in international law and has set forth its legal obligation to protect its citizens from international terrorism based on these principles. The U.S. thereby views the U.N. Charter as a body of principles that must be interpreted in the context of modern society and the practice of nations. These modern principles emphasize the shift from inviolable sovereignty to the protection of fundamental human rights. In interpreting these fundamental principles of the Charter, the United States shapes its duties and responsibilities in concert with these evolving principles of international law. These inherent, sovereign duties and responsibilities are discussed below.

The United States considers the duty to protect its nationals as a legal obligation of the government. This is represented through its actions, court decisions, and authoritative statements of its leaders. In the pre-Charter era, the United States used its armed forces frequently to protect its nationals. Some examples include the 1814 and 1815 incursions into Spanish West Florida; numerous actions in Mexico in 1836, 1874, 1877, 1878, 1880, 1882, 1890, and 1914; in Korea in 1895; during the Boxer Rebellion in China in 1899 and 1900; and in 1899 in Nicaragua, to name a small example.²⁵⁸ One scholar has commented that the United States acted to protect its nationals approximately 188 times by using force in the territorial sovereignty of another nation prior to the adoption of the U.N. Charter.²⁵⁹ The

²⁵⁸ ERICKSON, *supra* note 70, at 182.

²⁵⁹ Lillich, *supra* note 247, at 134.

United States Supreme Court has specifically recognized the duty of the government to protect United States citizens. "Citizenship is membership in a political society, and implies a duty of allegiance on the part of the member and a duty of protection on the part of society."²⁶⁰ The fundamental principles of citizenship and the relationship between a citizen and the government were set forth in the *Slaughterhouse* cases.²⁶¹ The Court traced the relationship between a government and its citizens in response to arguments about the legal rights of newly emancipated slaves. The Court set forth in great detail the reciprocally intertwined relationship of citizen and nation and stressed the fundamental truth that one does not exist without the other. In listing the various duties and relationships of the government to its citizens the Court stated, "[a]nother privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government."²⁶² The United States specifically recognizes this duty, and has applied and adapted it to the emerging international legal doctrine focusing on protection of human rights. This modified traditional duty is the U.S. position and strategy in response to international terrorism.²⁶³ The international community of states also has a duty to protect its citizens and non-nationals from international terrorism. This independent duty places significant legal requirements on nations to combat and prevent terrorist activities as will be discussed next.

²⁶⁰ *Luria v. United States*, 231 U.S. 9, 22 (1913).

²⁶¹ *See Slaughterhouse Cases*, 16 Wall. 36 (1873).

²⁶² *Id.* at 79.

²⁶³ *See supra* note 21 and accompanying text.

1. *Obligations by Nations to Protect Non-Nationals from International Terrorism: The Doctrine of State Responsibility*

Obligations by State's to act humanely, or in protection of their own citizens, is an easier principle to grasp than the responsibility of a State for the actions of third persons or groups who harm citizens of another nation. However, certain fundamental principles of international law exist governing the treatment of another nation's citizens. "When a State admits into its territory . . . foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded to them."²⁶⁴ This obligation that one state owes to another, or the doctrine of state responsibility, involves the duties which each state owes to other states in the world community of nations. This author strongly believes that the doctrine extends a duty by all states to suppress international terrorism as a function of state responsibility. In the *Island of Palmas* case, the International Arbitral Court defined the parameters of state responsibility:

Territorial sovereignty . . . involves the exclusive right to display the activities of the state. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights each State may claim for its nationals in foreign territory.²⁶⁵

Therefore, the entire system of state responsibility is set forth in a balance of rights and responsibilities toward each other state in the system of nations.

²⁶⁴ Barcelona Traction Case, 1970 I.C.J. 32, 46.

²⁶⁵ *Island of Palmas*, (United States v. Netherlands), United Nations, 2 REPORTS ON INTERNATIONAL ARBITRAL AWARDS 839 (1949).

Customary international law also holds that a state is normally only responsible for those violations of its duties for which it is directly responsible.²⁶⁶ Direct responsibility normally entails malicious and willful acts of the state, acts which the authorized agents of the state have performed, and acts for which the state is culpably negligent.²⁶⁷ Thus, the acts and omissions of state officials or agents are imputed to the state so long as they are within the scope of the official's authority or, if beyond the official's authority, are not repudiated by the state.²⁶⁸ Indirect responsibility for state actions is more difficult to ascertain. Normally, State A does not bear any responsibility for injuries to State B committed by private individuals unless these acts were at the command of State A, or State A was culpably negligent in not preventing the actions.²⁶⁹ Thus, the key to ascertaining state responsibility for protection of nationals involves a duty, imposed by international law or treaty, the breach of which is imputed to a state for the acts or omissions of its agents in creating the breach. Therefore, in the context of terrorism, it must be ascertained that a duty exists by states to prevent harm to all nationals from terrorists, that there is a breach of that duty either through direct participation or culpable negligence, resulting in the ability of another state to exercise its rights in retaliation under international law.

This culpable negligence standard is also known as the failure to exercise due diligence. "[t]he failure of a government to use due diligence to prevent an injurious act of a private

²⁶⁶ IAN BROWNLIE, *SYSTEM OF THE LAW OF NATIONS, STATE RESPONSIBILITY, PART I*, at 132 (1983)

²⁶⁷ *Id.*

²⁶⁸ ERICKSON, *supra* note 70, at 99 (citing MARYAN N. A. GREEN, *INTERNATIONAL LAW: LAW OF PEACE* 207 (1982)).

²⁶⁹ BROWNLIE, *supra* note 266, at 132.

person against a foreign state constitutes an international delinquency.”²⁷⁰ This due diligence standard has been applied in International as well as U.S. Courts.²⁷¹ “The central element of due diligence is fault. State responsibility arises if a state has knowledge or should have had knowledge, and if it fails to act having the opportunity to do so.”²⁷² Therefore, when a state fails to prevent activities within its borders that injure the nationals of another state, that derelict state may lose its right to territorial inviolability.²⁷³ In summary, to determine state responsibility, there must be a duty imposed by international law or treaty, a breach of that duty, and imputability of that breach to a particular state for a potential loss of the inviolability of sovereignty by the breaching state to exist. The legal basis for the duty by nations to prevent terrorism will be discussed next.

2. The Legal Duty by States to Prevent Terrorism and Terrorist Acts

As stated above, treaties and standards of general international law can impose liability upon states for the criminal actions of third parties. The sources and methods to determine international law were also discussed above.²⁷⁴ In determining the legal duty imposed upon

²⁷⁰ ERICKSON, *supra* note 70, at 101 (citing MANUEL R. GARCIA-MORA, INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES 20 (1962)).

²⁷¹ See *SS Lotus (France v. Turkey)*, 1927 P.C.I.J. (Ser. A) No. 10, at 88; *Corfu Channel*, *supra* note 100 to 111 and accompanying text; *United States v. Arjona*, 120 U.S. 479, at 484 (1887).

²⁷² ERICKSON, *supra* note 70, at 102.

²⁷³ *Id.* at 109. (citing BOWETT, *supra* note 52, at 54.

²⁷⁴ See *supra* notes 226 to 240 and accompanying text.

states to prevent and protect against terrorism and terrorist acts, several sources must be examined.

The Draft Code of Offenses against the Peace and Security of Mankind, proposed by the International Law Commission in 1954, stated that the organization, or encouragement of organization, of armed bands and terrorist groups for incursions into the territory of another state was an offense against mankind.²⁷⁵ It also proscribed direct support and toleration of the use of local territories as a base of operations against other states.²⁷⁶ The Commission's 1986 report defined terrorist acts as crimes against international peace.²⁷⁷ While these sources do not provide binding standards of international law, they provide persuasive authority for the parameters of duties by nations in respect to international terrorism.

The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, otherwise known as General Assembly Resolution 2625,²⁷⁸ stated:

Every state has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands . . . for incursion into the territory of another state. Every state has the duty to refrain from organizing, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.²⁷⁹

²⁷⁵ REPORT OF INTERNATIONAL LAW COMMISSION, (6th Session), 2 I.L.C. Y.B. 140, 151-155 (Articles 2(4) and 2(6)) (1954).

²⁷⁶ *Id.*

²⁷⁷ REPORT OF INTERNATIONAL LAW COMMISSION, (38th Session), 1, 104 n. 84, 109 art. 11(4) (1986).

²⁷⁸ *See supra* note 25.

²⁷⁹ *Id.* at 339.

This Resolution is considered by a majority of scholars to be an authoritative interpretation of the U.N. Charter.²⁸⁰

General Assembly Resolution number 3314,²⁸¹ defining aggression, provides in the preamble that it "calls upon all states to refrain from acts of aggression and other uses of force contrary to the Charter . . . and the Declaration . . . Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations."²⁸² While the preamble, in paragraph 4, provided the purpose of the Resolution was to act as a triggering definition of aggression for Article 39 Security Council action under the Charter,²⁸³ the definition of aggression also has independent, persuasive authority for the international community. The definition sets forth the limits of aggression and provides the duties of states in regards to acts of aggression. In particular, Articles 3(f) and 3(g) have an impact on terrorist activities and the duties of states to prevent these activities. Paragraph (f) provides:

[t]he action of a [s]tate in allowing its territory, which it has placed at the disposal of another [s]tate, to be used by the other [s]tate for perpetrating an act of aggression against a third [s]tate,' is an act of aggression. Accordingly, the state which assists the aggressor state in performing its aggressive act, itself commits an act of aggression.²⁸⁴

²⁸⁰ See John F. Murphy, *State Self-Help and Problems of Public International Law*, in LEGAL ASPECTS OF INTERNATIONAL TERRORISM (Alona E. Evans & John F. Murphy eds., 1978); Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations*, 65 AM. J. INT'L L. 713 (1971).

²⁸¹ G. A. Res. 3314, *reprinted* in 15 UNITED NATIONS RESOLUTIONS, SERIES I: GENERAL ASSEMBLY 392 (Dusan J. Djonovich ed., 1984).

²⁸² *Id.* at 393 (citing G. A. Res. 2625, *supra* note 25).

²⁸³ *Id.* at 393.

²⁸⁴ *Id.*

The difficulty in applying this definition to terrorist groups is that they are not “states” within the Resolution. Yet, it seems contrary to the purpose of the Resolution to find that harboring outside terrorist organizations would be protected simply because the organizations were not states under the definition of the Resolution. Paragraph (g) defines aggression as:

[s]ending by or on behalf of a [s]tate of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another [s]tate of such gravity as to amount to [acts equivalent to the six acts of aggression listed in Article 3, paragraphs (a)-(f),] or its substantial involvement therein.²⁸⁵

These definitions were to provide the basis, or triggering mechanism, for the United Nations Security Council to act pursuant to Article 39 of the Charter. However, they also provide significant guidance to the international community regarding acts that constitute aggression. They serve a dual purpose to put states on notice that activities that violate the definitions listed in the Resolution could bring about Security Council action. Therefore, the definitions provide clear guidance of the duties of states in regards to acts of aggression.

The International Court of Justice also found the proposition that Resolution 3314 provides guidance outside the context of Article 39 determinations in the *Nicaragua* case.²⁸⁶ In the *Nicaragua* case, the Court held, “it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border.”²⁸⁷ This comment, in response to an argument that small bands of irregular forces crossing the border did not amount to an armed attack, established that indeed such use of forces could amount to an armed attack and constitute aggression under

²⁸⁵ *Id.*

²⁸⁶ *See supra* note 134.

²⁸⁷ *Id.* at 103.

the Charter. The Court relied upon Article 3(g) of the General Assembly's definition of Aggression, in Resolution 3314, to make this determination, which the court stated reflected customary international law.²⁸⁸

The General Assembly strongly condemned as criminal "all acts, methods and practices of terrorism wherever and by whomever committed," in General Assembly Resolution 40/61 in 1985.²⁸⁹ It also reinforced the duties by states in fighting terrorism when it "calls upon all States to fulfill their obligations under international law to refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed toward the commission of such acts."²⁹⁰ The Second Circuit Court of Appeals provides substantial authority that private actions by individuals can violate the law of nations if they are of "universal concern."²⁹¹ While the issue involved in that case concerned jurisdiction under the Alien Tort Claims Act, the Court provided an analysis of the development of international legal standards in its opinion. Relying on prior precedent, the Court stated, "courts ascertaining the content of the law of nations 'must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.'"²⁹² The defendant was alleged to have committed numerous violations of human rights including rape, torture, murder, and forced impregnation which

²⁸⁸ *Id.*

²⁸⁹ *See supra* note 183.

²⁹⁰ *Id.*

²⁹¹ *Kadic v. Kardzic*, 70 F.3d 232, 239-40 (2nd Cir. 1995).

²⁹² *Id.* at 238. (citing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)).

were designed to destroy ethnic groups in Bosnia.²⁹³ The principal defense to these allegations was that the defendant was not acting as a state actor and therefore did not violate the law of nations as they only apply to state actors under international law.²⁹⁴ The Court rejected this argument and found individual liability under the law of nations for violations of "universal concern."²⁹⁵ The Court studied numerous international precedents in reaching the conclusion that the individual actions by the defendant were violative of the law of nations. These precedents included prior cases, United Nations Resolutions, International Conventions, and governmental declarations.²⁹⁶ The Court's decision provides persuasive authority that individual acts of terrorism violate the law of nations. At least one scholar has reached this conclusion since the case was decided.²⁹⁷

The Resolutions and Court decision discussed above, coupled with the multinational terrorism agreements discussed in the section on terrorism agreements above, provide substantial support that an obligatory duty exists for states to prevent terrorism and terrorist acts. This opinion is shared by the Centre for Studies and Research in International Law and International Relations of The Hague Academy of International Law. This group of scholars met in 1988 to discuss the legal aspects of international terrorism and set forth what that group of scholars considered to be the "Corpus of Principles Relative to the Attitude of States

²⁹³ *Id.* at 242.

²⁹⁴ *Id.* at 239.

²⁹⁵ *Id.* at 240-41.

²⁹⁶ *Id.* at 239-245.

²⁹⁷ See Michael Rosetti, Note, *Terrorism as a Violation of the Law of Nations After Kadic v. Kardzic*, 12 ST. JOHN'S J. LEGAL COMMENT. 565 (1997).

towards International Terrorism."²⁹⁸ Principles 1.1 and 1.2 essentially set out the provisions of General Assembly Resolution 40/61 and 2625, discussed above, as core duties of States regarding international terrorism. "States have the obligation under international law to refrain from organizing, instigating, assisting or participating in terrorist acts in other states."²⁹⁹ "States have the obligation under international law to refrain from acquiescing in activities within their territory directed towards the commission of terrorist acts in other states."³⁰⁰

Applying these authorities to our previous discussion of sources of international law, it becomes quite clear that there is ample authority that states are required to abide by these duties as a matter of international law. The duty to protect a nation's nationals as a function of government is proven through state action, court decisions, and the statement of our national leaders as set forth in the nation's national security strategy. The duty to protect citizens of other countries in a nation's sovereign territory is a function of customary international law and the Doctrine of State Responsibility. This Doctrine imposes liability, in the form of a loss of sovereign sanctity, for breaches of internationally imposed duties to protect. Protection of persons against terrorist acts is an international duty imposed by a variety of sources. The Draft Code of Offenses against the Peace and Security of Mankind, proposed by the International Law Commission, serves as a persuasive source to impose legal obligations on states to refrain from support of terrorist organizations. General

²⁹⁸ CENTRE FOR STUDIES AND RESEARCH IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS, HAGUE ACADEMY OF INTERNATIONAL LAW, *THE LEGAL ASPECTS OF INTERNATIONAL TERRORISM* 15 (1988).

²⁹⁹ *Id.* (Principle 1.1).

³⁰⁰ *Id.* (Principle 1.2). See also Richard B. Lillich & J. M. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U. L. R. 268-69, 275 (1976).

Assembly Resolution 2625 and 3314, two declaratory resolutions, also provide substantial authority for proscribing support of terrorist organizations. The decision of the International Court of Justice in the *Nicaragua case* reinforces these prohibitions of support to terrorist organizations. General Assembly Resolution 40/61 and the comments by the Hague Academy of International Law further reiterate these obligations. Finally, the decision by the 2d Circuit Court of Appeals in the *Kadic* case provides substantial authority for the proposition that terrorism is a universal crime against humanity. These sources, taken together, provide an international legal basis for an independent duty by states to protect individuals, and in particular a nation's own citizens, from terrorism and terrorist acts.

3. The Shift Toward a Justice-Based Approach to Charter Interpretation: Humanitarian Intervention and Opinio Juris

General principles of human rights contained within the U.N. Charter provided the genesis for a shift in focus to a human rights-based approach to international law. Numerous Conventions, court decisions, and the practice of nations, to include humanitarian intervention to protect basic human rights, confirm this shift. An example of this shift lies in the U.N.-backed actions in Haiti and Somalia, and the present actions occurring in Kosovo. The requirement by a nation to protect its citizens as an obligation of government is not a difficult concept to grasp. The United States is not the only nation to believe that protecting its own citizens is an obligation of the government. This is perhaps best demonstrated by the pre-Charter international law practice of nations intervening to protect their nationals. Many

scholars have argued that this obligation has been extended past a requirement solely to protect the human rights of each individual nation's citizens. They argue that the emphasis, from the passage of the United Nations Charter to the present day, on human rights in international law makes it an obligation on all nations to protect the fundamental human rights of all citizens. Numerous articles and debates have surrounded this proposition in recent decades. While not directly related to the principle of *humanitarian self-defense* proposed by this paper, the practice of nations in this respect adds significant legal support for the U.S. paradigm of protecting its nationals from terrorist acts. Each doctrine focuses on humanitarian values, or protecting human rights, as its basis to intervene. The practice of humanitarian intervention to protect the fundamental human rights of another nation's citizens will be discussed next.

Richard Lillich discussed the evolution of international law in practice, recognizing a justice-based approach to Charter interpretation in his 1969 article, *Intervention to Protect Human Rights*.³⁰¹ He points out that the International Conference on Human Rights, held in March of 1968 in Montreal, recognized the years 1945 to 1968 as a great period in international law for the recognition and definition of human rights. However, the Conference also found that relatively little effort was done to enforce those rights.³⁰² Lillich also noted that the period from 1968 to the present would be marked by the development of techniques and machinery to enforce, supervise and control these newly defined principles.³⁰³ Professor Lillich specifically noted the tension between the Charter's purpose of maintaining

³⁰¹ *Supra* note 144.

³⁰² *Id.* at 205 (citing J. Carey, *International Protection of Human Rights*, 12th Hammar skjöld Forum 105 (1968).

³⁰³ Lillich, *supra* note 144, at 205-06.

peace and the growing importance of its purpose to protect human rights in 1997.³⁰⁴

Prophetically predicting the future, Professor Lillich recalled his previous opinion from the late 1960s, set forth in his McGill article,³⁰⁵ that "absent effective U.N. humanitarian intervention, unilateral or collective intervention by States was not precluded in cases involving gross deprivations of basic human rights."³⁰⁶ Professors McDougal and Reisman expressed a similar view in 1973 when they argued for U.N. intervention to stop human rights abuses in Nigeria.³⁰⁷ Reisman and McDougal followed Lillich's argument that in the absence of U.N. humanitarian intervention, unilateral or collective intervention by one or more states would be permissible under international law.³⁰⁸ These prophetic statements exemplify the current shift in the law presently demonstrated in the ongoing NATO intervention in Kosovo. This shift in international law, from a peace-based Charter interpretation to a justice-based interpretation and implementation, will be discussed next.

The U.N. Security Council began to implement measures to protect human rights under this justice-based interpretation in 1968 when it found Rhodesia's human rights violations constituted a threat to the peace under Article 39 of the Charter. This finding justified the United Nations applying economic sanctions under Article 41.³⁰⁹ It acted similarly in 1977 against South Africa, basing its authority to employ an arms embargo, pursuant to Chapters

³⁰⁴ Richard B. Lillich, *Kant and the Current Debate over Humanitarian Intervention*, 6 J. TRANSNAT'L L. & POL'Y 397, 399 (1997).

³⁰⁵ *Supra* note 144.

³⁰⁶ *Id.*

³⁰⁷ Michael Reisman & Myres S. McDougal, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167 (Richard B. Lillich ed., 1973).

³⁰⁸ *Id.*

³⁰⁹ See S.C. Res. 253, U.N. SCOR, 23d Sess., 1428th mtg at 5, U.N. Doc. S/RES/253 (1968).

39 and 43 of the Charter, on South Africa's apartheid system.³¹⁰ It followed these non-forcible interventions in 1991 with the protection of the Kurds in Northern Iraq to prevent further Iraqi oppression and human rights violations.³¹¹ This was followed in 1992 in Somalia where intervention was authorized "to establish a secure environment for humanitarian relief operations."³¹² An intervention in Haiti in 1994 followed this pattern. The Council stated it was "gravely concerned by the significant further deterioration of the humanitarian situation in Haiti . . . of systematic violations of civil liberties, the desperate plight of Haitian refugees . . ."³¹³ In 1994, the Security Council also reaffirmed its humanitarian presence in Somalia for follow-on operations for "continuing its efforts to provide humanitarian relief to all in need throughout the country."³¹⁴

One possible explanation for this upsurge in U.N.-sponsored humanitarian interventions over previous decades is the collapse of the Soviet Union and the end of the Cold War. These events arguably translate into a significantly lower probability that veto would occur within the Security Council, thereby making intervention easier to promote. However, many in the international community deem the basis for these interventions as reaffirming the inherent international duty to protect human rights as a foundational purpose under the Charter. Great Britain proposed in 1998, with Canada joining in principal, that humanitarian needs could provide a legal basis for forcible intervention without a Security Council

³¹⁰ See S.C. Res. 418, U.N. SCOR, 32d Sess., 2046th mtg. At 5, U.N. Doc. S/INF/33 (1977).

³¹¹ See S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg. At 31-32, U.N. Doc. S/INF/47 (1991).

³¹² See S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. at 63, U.N. Doc. S/RES/794 (1992).

³¹³ See S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. at 2, U.N. Doc. S/RES/940 (1994).

³¹⁴ See S.C. Res. 897, U.N. SCOR, 49th Sess., 3334th mtg. at 2, U.N. Doc. S/RES/897 (1994).

Resolution.³¹⁵ They made this proposal in a paper, which they circulated at an October 7, 1998, National Agency Conference discussing the legal basis for intervention in Kosovo. The paper concluded, "[t]he UK's view is therefor that, as matters now stand and if action through the Security Council is not possible, military intervention by NATO is lawful on grounds of overwhelming humanitarian necessity."³¹⁶ The subsequent intervention by NATO, without Security Council authorization, prompts an evaluation of whether the aforementioned interventions provide sufficient *opinio juris* to justify a restructured paradigm of international law. This restructured paradigm would value human rights over peace in the Charter in specific circumstances. This author concludes that a new paradigm has been created, through sufficient acts by civilized nations, based on *opinio juris* valuing human rights over sovereignty in certain limited circumstances.

In establishing customary international law, as discussed above,³¹⁷ nations must act out of a sense of legal obligation, or *opinio juris*. Typically, the focus for establishing the sense of legal obligation is on the legal basis used for the acts that have occurred. An argument can certainly be made that the aforementioned U.N. interventions were performed under the legal basis of Chapters VI and VII of the Charter. Chapters VI and VII were, in fact, the legal mechanisms used to intervene in those cases. However, this author argues that while specific legal *authority* to conduct an action is essential for its legitimacy under international law, this differs significantly from the underlying legal *obligation*, or *opinio juris*, on which the actions are based. In this respect, *opinio juris* is best determined by the legal motive of the

³¹⁵ See CINCUSNAVEUR message 101000Z Oct. 98.

³¹⁶ *Id.*

³¹⁷ See *supra* note 226 and accompanying text.

individual states in taking the action. The nation's official statements and declarations that accompany each action may determine the underlying legal motive for specific actions. In the cases of the U.N. interventions cited above, each was premised on the motive of protecting fundamental human rights and humanitarian concerns. The Kosovo intervention by NATO is likewise premised upon human rights and humanitarian concerns. President Clinton, in his address to the nation, explained the rationale behind the U.S. participation in the NATO intervention. His address was replete with examples of human rights violations. These violations provided an explanation for the U.S. intervention.³¹⁸ Examples included stripping the country of its constitutional autonomy, denying the right of the people to speak their native language, scorched earth policies, and mass executions.³¹⁹ These statements provide the United States' motive, or *opinio juris*, for its action as well as the action of its 18 NATO allies. This belief that *opinio juris* is found in the motives of states, vice the legal mechanism used to take state action, finds support in various court opinions. The judgment of the *International Military Tribunal in the Trial of Major War Criminals*,³²⁰ the judgment in *United States v. Leeb* (the High Command Case),³²¹ the decision of the International Court of Justice in the *Nicaragua case*,³²² and the *Tadic* decision,³²³ all support the conclusion that Courts look to the motives of states, vice the legal basis for enabling actions, as the *opinio*

³¹⁸ President William Clinton, Address to the United States (Mar. 24. 1999), *available at* State Department, <<http://www.state.gov/www/statements/1999>>.

³¹⁹ *Id.*

³²⁰ *See supra* note 46.

³²¹ 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 426, 533-35 (1948).

³²² *See supra* note 134.

³²³ *See supra* note 253.

juris in determining customary international law in their decisions. The two Nuremberg decisions had to get around the *si omnes* clause,³²⁴ in order for liability to attach to the conduct of German war criminals. The Court found that the motive of nations in passing the Conventions was to make violations of the laws of war, crimes against humanity with universal application. The *Nicaragua case* required application of customary international law because the United States had a treaty reservation to the multilateral treaty determining jurisdiction.³²⁵ The Court also relied on the motive of States when they passed the Statute determining jurisdiction. The Court found that nations intended to give the Court universal jurisdiction. The *Tadic* Court had to apply customary international law principles to establish liability for war crimes in a common Article 3 conflict. In doing so, the Court relied upon motive evidence that included resolutions, declarations, and official statements in reaching its decision.³²⁶

In choosing its sources, the Hague Tribunal appears to have followed Richard Baxter's insightful conclusion that '[t]he firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts.'³²⁷

An important event supporting this belief that the paradigm of international law has shifted to a justice-based approach is the response by the United Nations to the NATO action

³²⁴ Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 239 (1996). Germany was not a signatory to the Hague Convention or 1929 Geneva Prisoner of War Convention, therefore the defendants argued they could not be held accountable for violations of these treaties as their sovereigns were not bound by them.

³²⁵ *Id.*

³²⁶ See *supra* note 253 and accompanying text.

³²⁷ Meron, *supra* note 324, at 241. (citing Richard Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 300 (1965-66).

in Kosovo. The Secretary General, in a statement about NATO's intervention in Kosovo, acknowledged that the use of force may sometimes be legitimate in the pursuit of peace.³²⁸ By stating this proposition, the Secretary General acknowledged the legitimacy of the NATO intervention, without Security Council authorization, on grounds of humanitarian concerns. Additionally, the Security Council rejected a demand for the cessation of NATO's intervention sponsored by the Russian Federation.³²⁹ The Security Council only had three votes in favor of the resolution condemning NATO's action, and twelve against the proposed resolution.³³⁰ The Security Council thereby legitimized the NATO intervention in Kosovo on humanitarian grounds without prior Security Council approval as well. The statements by Great Britain and Canada, the subsequent intervention, without Security Council approval, by 19 nations in NATO to prevent human rights atrocities, and acceptance of the intervention on those grounds by the Secretary General and Security Council, add significant weight to the argument that the focus of international law has shifted, from sovereignty and maintenance of peace, to protection of human rights under the Charter.

As a secondary point, the world community overwhelmingly came together to create formal rules and principles of international law relating to the conduct of parties in international armed conflicts. Although termed humanitarian principles, they essentially exist to protect fundamental human rights. Unfortunately, they are not triggered by acts of international terrorism because the acts do not rise to the level of international armed

³²⁸ U.N. Press Release SG/SM/6938, *available at* <http://www.un.org/News/Press/docs/1999/19990324.sgsm6938.html>.>.

³²⁹ U.N. Press Release SC/6659, *available at* <http://www.un.org/News/Press/docs/1999/19990326.sc6659.html>.>.

³³⁰ *Id.*

conflict. A party to an international armed conflict bears many responsibilities due to its participation. A force, occupying another state's territory, carries a heavy burden to protect human rights of its nation's enemies. Yet, it is argued that this same state has few formalized rights to protect its own citizens in another sovereign state because of the prohibitions contained in Article 2(4) of the Charter. This illogical situation defies the fundamental purpose behind the Charter, which is the protection of fundamental human rights. Logic, and legal precedent, dictates that individual states have an affirmative obligation to ensure their citizen's fundamental human rights are protected. The pre-Charter customary practice of forcible self-help to protect a nation's citizens must survive the passage of the Charter for any meaning and effect to be given to its purpose and also the laws of armed conflict

Taken together, the shift in focus to a justice-based interpretation of the Charter, the obligation to protect a nation's citizens from harm as an essential role of sovereignty, and the international legal requirement to protect all citizens from terrorism, leads to the conclusion that a paradigm of *humanitarian self-defense* is required under international law. Viewing this international duty, to protect citizens against terrorism, in light of the failure of the U.N. collective security process leads to the natural practice of nations unilaterally to fulfill these obligations. An examination of these practices is discussed next

C. The Failure of the U.N. Collective Security Process and the Practice of Nations to Protect its Citizen's Human Rights

Professor Myres McDougal was, at one time, a staunch advocate of the restrictivist view that Article 2(4) prohibited any use of force outside the strict language of the Charter. He changed his mind, however, based on the same arguments being proposed by this author. "I'm ashamed to confess that at one time I lent my support to the suggestion that article 2(4) and the related articles did preclude the use of self-help less than self-defense. On reflection, I think that this was a very grave mistake, that article 2(4) and article 51 must be interpreted differently."³³¹

To support this changed interpretation, Professor McDougal looked not only to the intent of the framers of the Charter and its purposes, but also to the lack of effective enforcement machinery to implement the Charter's provisions and the practice of nations in response to these shortcomings.³³² This analysis closely mirrors that of the present author in concluding that the pre-Charter exercise of forcible self-help is valid under international law. Professor McDougal briefly highlighted his arguments to support this change of position. While his discussion was limited in nature, it provides additional support for this author's conclusion. Professor McDougal refers to the teleological view as "the principle of effectiveness."³³³ He argues that an ineffective collective security function requires a reexamination of how the international community can best:

Implement the principal purposes of minimizing coercion, of insuring that states do not profit by coercion and violence, I submit to you that it is simply

³³¹ Myres S. McDougal, *Authority to Use Force on the High Seas*, in 61 READINGS IN INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 551, 559 (Richard B. Lillich & John Norton Moore eds., 1980).

³³² *Id.*

³³³ *Id.*

to honor lawlessness to hold that members of one state can, with impunity, attack the nationals . . . of other states without any fear of response.³³⁴

From this argument, Professor McDougal also proposes the doctrine of self-help as a proper response and solution to the problem. He refers to the practice of nations as well to confirm his recommendation, but does not elaborate or support this observation. He states, “[m]any states of the world have used force in situations short of the requirements of self-defense to protect their national interests.”³³⁵ While this author agrees with his analysis, a further inquiry into the practice of nations to protect not only their own citizen’s human rights, but also human rights in general must be examined.

Derek Bowett critically examined the practice of nations in using forcible self-help to protect nationals after the passage of the Charter in 1986.³³⁶ His analysis excluded all other events of self-help except forcible self-help actions in the territory of another sovereign without that sovereign’s consent.³³⁷ He sets forth nine instances where various States acted to protect their national’s human rights abroad. These are summarized as follows:

1948- In response to numerous cross border incursions between various Arab States and Israel, the Security Council requested an explanation from each State for the legal basis for their actions. Each responded that the use of force was justified to protect nationals.³³⁸

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ Bowett, *supra* note 72, at 41.

³³⁷ *Id.*

³³⁸ *Id.* (citing U.N. SCOR, 3d Sess., 301st mtg. at 7, 10 (1948)).

1951- Great Britain's articulated basis for its contemplated use of force to protect its nationals in Iran given to the House of Parliament as an example of national policy.³³⁹

1952- Great Britain contemplated the use of force to protect its nationals during the Cairo riots in Egypt.³⁴⁰

1956- England's justification for its participation in the invasion of the Suez was based upon protection of nationals.³⁴¹

1960- Belgium's intervention in the Congo was based on protection of its citizens.³⁴²

1965- Protection of nationals was cited by the United States as its basis for intervention into the Dominican Republic.³⁴³

1975- The U.S. intervention to release the Mayaguez from Cambodian control and rescue its crew in part hinged on protecting its nationals.³⁴⁴

³³⁹ *Id.* (citing *Statement by British Foreign Secretary in the House of Commons*, 488 PARLIAMENTARY DEBATES (HANSARD) 43; *Statement by British Foreign Secretary in the House of Commons*, 489, 488 PARLIAMENTARY DEBATES (HANSARD) 522-23, 1186 (1951)).

As I have repeatedly informed the house, His Majesty's government are not prepared to stand by idle if the lives of British nationals are in jeopardy. It is the responsibility of the Persian government to see to it that law and order are maintained and that all within the frontiers of Persia are protected from violence. If, however, that responsibility were not met it would equally be the right and duty of His Majesty's government to extend protection to their own nationals.

Id.

³⁴⁰ *Id.* (citing EDEN, FULL CIRCLE 232 (1960)).

³⁴¹ *Id.* (citing 588 PARLIAMENTARY DEBATES (HANSARD) 1275, 1277, 1377, 1566-67 (1956)).

³⁴² *Id.* (citing CHOMAE', LA CRISE CONGOLESE 155-174 (1960)).

³⁴³ *Id.* (citing U.S. Representative Adlai Stevenson's statement contained in U.N. SCOR, 20th Sess., 1196th mtg. at 14).

³⁴⁴ *Id.* (citing *Keesing's Contemporary Archives*, reprinted in 69 AM. J. INT'L L. 875-879 (1975)).

1976- The Israeli raid at Entebbe was to rescue Israeli passengers held in Uganda.³⁴⁵

1980- The U.S. attempted an operation to rescue U.S. hostages held in Iran.³⁴⁶

Professor Bowett discounts arguments that an insufficient number of international states participated in these actions to constitute a universal practice by nations. He discounts this argument by stating, “[t]his argument has doubtful validity because few states have the capacity to plan and execute what may be a very difficult and hazardous operation.”³⁴⁷ This analysis is consistent with U.S. interpretations of sources of international law.³⁴⁸

Additional examples, when states sought to protect their nationals, can be found in the works of other scholars. Lieutenant Colonel Erickson also identifies the West German responses in 1977 in Mogadishu, and the U.S. intervention in Grenada in 1983, as further evidence of similar state practices.³⁴⁹ Another scholar has echoed the examples previously set forth by Bowett, and added some additional examples as well. The British evacuation of its citizens in Zanzibar in 1964,³⁵⁰ the evacuation of U.S. citizens from Lebanon in 1976,³⁵¹ the threat of France to intervene in the Western Sahara in 1976,³⁵² and the Egyptian raid on

³⁴⁵ *Id.* (citing U.N. YEARBOOK 319-320 (1976)).

³⁴⁶ *Id.* (citing 1980 I.C.J. 32).

³⁴⁷ *Id.* at 41 (citing as an example the failed rescue attempt by the U.S. in Iran in 1980).

³⁴⁸ See note 231 at Sections 102 and 103. (The capacity and capabilities of nations is considered a factor in determining the relative weight given to determine state practices).

³⁴⁹ ERICKSON, *supra* note 70, at 183.

³⁵⁰ RONZITTI, *supra* note 140, at 27 (citing 687 PARLIAMENTARY DEBATES (HANSARD) 38 (1964)).

³⁵¹ *Id.* at 36-37 (citing 22 *Keesing's Contemporary Archives* para. 28119 (1976)).

³⁵² *Id.* at 40 (citing 24 *Keesing's Contemporary Archives*, para. 28820-21 (1978)).

Larnaca,³⁵³ are additional examples of self-help provided by Ronzitti. Additionally, James Edmunds stated in his article:

Common practice . . . suggests that states do not regularly refrain from forcible self-help. Since 1945, states have resorted to numerous acts of extraterritorial forcible self-help. The Entebbe raid, the Cuban Missile Crisis, the United States' intervention into Cambodia, the Corfu Channel Case, the aborted U.S. raid into Iran, and South Africa's attack of national liberation movements in neighboring territories all evidence the continuation of the customary privilege.³⁵⁴

Professor Yoram Dinstein also supports the proposition that forcible self-help to protect nationals is permissible under the Charter.³⁵⁵ Professor Dinstein extends the traditional concept of self-defense to encompass the use of force to protect a nation's nationals in a country unable or unwilling to abide by its international duties. He does so by analogizing the attack on a nation's citizens with an attack on the country itself.³⁵⁶ Professor Dinstein, therefore, bases the self-defense theory solely on principles of nationality and the international duties governments owe their citizens. He specifically states that this ability is not based on human rights protections.³⁵⁷ This is the point where Professor Dinstein and this author disagree.

Dinstein claims that an attack on a nation's citizen is an armed attack on the nation itself. This thereby triggers the ability by the nation to defend against direct state attack, or by

³⁵³ *Id.* at 40-41 (citing F. A. Boyle, *International Law in Time of Crisis: From the Entebbe Raid to the Hostage Convention*, 75 NW. U. L. REV. 822 (1980)).

³⁵⁴ Edmunds, *supra* note 121, at 145. (citations omitted).

³⁵⁵ YORAM DINSTEIN, *WAR, AGRESSION AND SELF-DEFENCE* 212 (1988).

³⁵⁶ *Id.* at 212-15.

³⁵⁷ *Id.* at 215.

attack from elements within that country.³⁵⁸ The problem with this argument is that there may be no violation of territorial integrity that would trigger the traditional doctrine of self-defense. Professor Dinstein relies heavily on the 1974 Definition of Aggression discussed above, as well as the *Nicaragua case*, to provide the basis for this argument.³⁵⁹ He establishes an argument for the doctrine of “extraterritorial law enforcement” as an extension of the parameters of self-defense under Article 51 of the Charter.³⁶⁰ His arguments to establish the doctrine are similar to those proposed by this author. He establishes international rights and duties between states to prevent terrorist attacks and provides a limited discussion of state practice to glean support for his theory. The weakness of his argument is the sole reliance upon nationality as a basis for intervention. While Professor Dinstein identifies international duties and state practices, his underlying premise does not take into account the modern application of the Charter. By negating the protection of human rights and focusing solely on strict notions of sovereignty, his argument falls into the classic peace-based Charter interpretation emphasizing the prohibitions under Article 2(4). Thus, his argument fares no better than the arguments for peacetime reprisal, and limited incursions that do not effect the territorial integrity of another nation.

However, Professor Dinstein’s article does provide additional support for this author’s conclusions. It recognizes the international duty by states to protect their own citizens, and the duty by all nations to prevent terrorist acts. His examples of self-help also lend support for the proposition that state practice has established a post-Charter practice of intervention

³⁵⁸ *Id.* at 224.

³⁵⁹ *Id.* at 188-90.

³⁶⁰ *Id.* at 221.

to protect nationals. Therefore, this author looks to Professor Dinstein's article for support, but disagrees with the underlying basis for the use of force he proposes.

The state practice highlighted in this section must be analyzed in light of evolving international legal values in the international community to accurately determine the significance of these practices. The works of noted scholars and the practice of nations amply demonstrate that the world community acts in intervention to protect nationals. Viewing these actions in conjunction with the evolving system of international law provides the conclusion that sufficient state practice has occurred to establish a legal duty by states unilaterally to protect their citizens from human rights abuses. This intervention is closely related the doctrine of self-defense, but has its roots in the practices of humanitarian intervention to protect fundamental human rights. Therefore, it serves as a hybrid, which may be logically named *humanitarian self-defense*.

V. The Legality of the U.S. Paradigm of Humanitarian Self-Defense

The U.S. paradigm of *humanitarian self-defense* is an obligatory, international legal requirement. It is embraced within the structure of Article 51 of the U.N. Charter. Whether this practice is an extension of pre-Charter rights, or is an evolution of Article 51 due to the practice of nations is really a matter of semantic argument. The facts would support that this practice occurred prior to the adoption of the Charter and still occur today. The key difference in the investigation of this paradigm lies in the lawful limits of its application.

Sufficient legal authority has been demonstrated in the text of this paper to show that a legal obligation exists for nations to protect their citizens from harm. Additionally, legal authority has shown that nations have a duty to protect citizens of the world from terrorism and terrorist acts. This particular duty has been proven by examination of case law, numerous resolutions by international legal organizations comprising a multitude of states, multilateral treaties, and definitive statements by governments and scholars. Considering these two international duties in the context of the purposes of the Charter, to protect fundamental human rights and preserve international peace and security, helps establish the limits for the execution of these duties. Traditionally, for the protection of nationals to be valid, there must have been an immediate threat to the safety of a nation's citizens. However, the modern shift in international law, and the interpretation of the Charter on a protection of justice approach, has diminished the importance of immediacy in the operation of the doctrine. The modern focus is on the justness of the cause and the lack of any manipulation of purpose for the ability to use force. The justness of the action, when evaluated under all attendant circumstances at the time it was taken, dictates the legality of the action. *Humanitarian self-defense* recognizes the principle of justice over sovereignty by its justification in protecting the fundamental human rights of citizens when an international obligation by another state to protect has been breached. Its legality is based on the international rights and duties between nation states in relation to protecting fundamental human rights.

Applying these standards to the recent missile strikes validates the legality of the U.S. action under this paradigm. The terrorist network of Usama Bin Laden had routinely

targeted U.S. citizens in acts of terrorist violence.³⁶¹ Afghanistan and Sudan were on notice that these actions were occurring from within their sovereign territory. They were advised to take action to prevent any recurrences.³⁶² Terrorist actions were ongoing, and future attacks were predicted forcing the United States to exercise its international legal responsibility to protect its citizens against further harm.³⁶³ The strikes were performed with precision munitions directed solely at the terrorist organizations and support facilities within Afghanistan and Sudan. Therefore, the response was proportional to the threat and was directed at eliminating future harm to U.S. citizens. The U.S. acted to protect the fundamental human rights of its citizens.³⁶⁴ While the U.S. actions were two weeks after the terrorist attacks, the response was just in its motive and was proportional to the ends sought to be achieved. The territorial sovereignty of Sudan and Afghanistan was violated solely to enforce the U.S. legal obligation under international law. Sudan and Afghanistan, by their failure to exercise their international duty to protect citizens from terrorist attacks, thereby temporarily forfeited their ability to protest the U.S. actions. The U.S., in effect, stood in the shoes of the Sudanese and Afghanistan governments and exercised their legal obligations due each country's inability to live up to its legal obligations.

³⁶¹ The State Department, *Fact Sheet: Usama bin Laden*, released Aug. 21, 1998, available at http://www.state.gov/www/regions/africa/fs_bin_laden.html; Text: *State Department Issues Fact Sheet on Bin Laden*, available at <http://www.illusions.com/opr/statedeptfactsheetbinladen'sdeclarationofwar>.

³⁶² President William Clinton, address to the nation on Aug. 20, 1998, available at http://www.state.gov/www/regions/africa/srtike_clinton.980820a.html.

³⁶³ *Id.*

³⁶⁴ President Clinton, in his address to the United Nations following the missile strikes, stated, "[t]errorism is not fading away with the end of the 20th century. It is a continuing defiance of Article 3 of the Universal Declaration of Human Rights, which says, 'Everyone has the right to life, liberty and security of person.'" Remarks by the President to the Opening Session of the 53rd United Nations General Assembly, Sept. 21, 1998, available at http://www.state.gov/www/global/terrorism/980921_pres_terror.html.

The international protests regarding the strikes are understandable. Viewed from a traditional understanding of Article 51 of the Charter, the global reaction is not surprising. International law is similar in nature to the process of civil disobedience. Protests and disagreements occur as the system of law evolves, but the conflict of ideas helps determine the parameters of the law in the international system. The conflict is beneficial to crystallize and focus the legal concepts in dispute, and assist in determining the parameters of lawful action.

Customary prescription has always required a high degree of necessity – specifically, in the case of an anticipated attack, a high degree of imminence – to support the lawfulness of intense responding coercion. One index of the required condition of necessity is precisely the degree of opportunity for effective recourse to nonviolent modes of response and adjustment, including invocation of the collective conciliation functions of the United Nations.³⁶⁵

“Customary law, however, can be superceded by customary norms that subsequently evolve. To the extent that Article 51 represents a codification of customary law, it assumes the characteristics of customary law, including the susceptibility to change by a new code of state behavior.”³⁶⁶ The author proposes that the new code of state behavior has established the U.S. paradigm of *humanitarian self-defense*.

³⁶⁵ McDougal & Feliciano, *supra* note *Conditions and the Expectation of Necessity*, LAW AND MINIMUM WORLD PUBLIC ORDER, in NATIONAL SECURITY LAW, at 108 (John Norton Moore, Frederick S. Tipson and Robert F. Turner eds., 1990).

³⁶⁶ Edmunds, *supra* note 121, at 144, n. 83 (citing BRIERLY, *supra* note 70, at 57-62).

VI. Conclusion

The world community's response to the missile strikes on the terrorist camps and support facilities is not surprising. While the United States has adopted a position for dealing with terrorism and terrorists, beginning in the 1970s after the raid at Entebbe, it has done little to explain its rationale. The purpose of this paper has been to set forth how the United States got to its present paradigm of dealing with terrorists and terrorism.

In a changing world of nations with competing interests and goals, the establishment of principles of law to assist nations in dealing with each other is a complex and time consuming task. The international legal system is a system of civil disobedience. Change is accomplished through expanding practices by states, which are either accepted or rejected by other nations within the international community. It is therefore essential to articulate the specific legal basis for actions that exceed the scope of traditional practice. This articulation then allows other nations to examine the practice with greater understanding and stimulates debate about the quality of the basis and act in controversy.

The U.S. paradigm of *humanitarian self-defense* achieves its validity from a shift in international law from a sovereignty or peace-based system, to a system where protection of fundamental human rights, or justice, is of equal concern. This inherent tension between sovereignty and justice is similar to the tension between the reasonableness and warrant clauses in the Fourth Amendment of the Constitution. Each interest to be protected has valid competing concerns as its basis. Viewing the missile strikes under a sovereignty/peace-based system leads to a legally unsupportable outcome. This was explored early in the paper as each potential legal basis for supporting the attacks under the sovereignty approach was

invalidated. The realities of the political process involved in the community of nations likewise proved to be unsuccessful in combating terrorism. Security Council response as a primary means of combating terrorism is impracticable. The ability to veto actions by members of the Security Council, coupled with the inherent lack of indigenous support in manpower and intelligence assets, and the inability to respond in a timely fashion to events keeps the Security Council from being a valid response entity. The inability to reach accord on definitions of terrorism and terrorist acts dooms multilateral agreements to failure as well. Nations therefore have sought alternative rationales for legitimizing their ability to fight terrorism.

The shift in the last 50 years to a justice-based approach to international relationships, coupled with the international attempts to constrain and eliminate terrorism have provided the necessary foundations for a new international paradigm. Traditional duties of governments and nations have evolved along with these changes. These prior doctrines and duties absorb the modern principles and are thereby adapted and modified to remain consistent with the law. State responsibilities to protect their citizens, and prohibit harm to other citizens from within their sovereign territory, have been merged on top of the modern trend of the protection of human rights. This translates into the modern U.S. paradigm of *humanitarian self-defense*. Articulating the evolution of this doctrine is critical to its continued validity in the law of nations. The logic of this paradigm is summarized in the following quote:

[a]t a time when international society is moving towards a wider and more effective acceptance of basic human rights, it would be distinctly incongruous to deny the continuing validity of measures to protect nationals against arbitrary violence and threats to their lives. The values protected by the right

of protection are the same values as are inherent in the promotion of human rights.³⁶⁷

³⁶⁷ Bowett, *supra* note 72, at 44-45.